LEGITIMATE INTERPRETATION:

COMPARATIVE REASONING IN INTERNATIONAL COURTS AND TRIBUNALS

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This dissertation is submitted for the degree of Doctor of Philosophy

DECLARATION

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University of similar institution except as declared in the Preface and specified in the text.

This thesis, including footnotes, does not exceed the permitted length.

Daniel Peat

October 2015

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ABBREVIATIONS

AB - Appellate Body of the World Trade Organization

AJIL - American Journal of International Law

CJICL - Cambridge Journal of International & Comparative Law

CLJ- Cambridge Law Journal

CoE - Council of Europe

DSM - Dispute Settlement Mechanism

DSU - Dispute Settlement Understanding

ECHR - European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)

ECtHR - European Court of Human Rights

EJIL - European Journal of International Law

GATT - General Agreement on Tariffs and Trade 1994

HRLR - Human Rights Law Review

ICC - International Criminal Court

ICJ - International Court of Justice

ICL - International Criminal Law

ICLQ - International & Comparative Law Quarterly

ICSID - International Centre for the Settlement of Investment Disputes

ICTR - International Criminal Tribunal for Rwanda

ICTY - International Criminal Tribunal for the former Yugoslavia

IHL - International Humanitarian Law

IMT - International Military Tribunal at Nuremberg

IMTFE - International Military Tribunal for the Far East

JICJ - Journal of International Criminal Justice

JIEL - Journal of International Economic Law

NYU JILP - New York University Journal of International Law & Politics

OJLS - Oxford Journal of Legal Studies

PC - Privy Council

RIAA - Reports of International Arbitral Awards

RPE - Rules of Procedure & Evidence

UKSC - Supreme Court of the United Kingdom

UN - United Nations

UNTS - United Nations Treaty Series

VCLT - Vienna Convention on the Law of Treaties 1969

VJIL - Virginia Journal of International Law

WTO - World Trade Organization

ZaöRV - Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Justice Holmes, in *Towne v Eisner,* 245 U.S. 418, 425 (1918)

INTRODUCTION

The interaction between domestic law and international law is a topic of perennial interest for international lawyers. Domestic law has long been recognised as a source of international law,[1] an inspiration for legal developments,[2] or the benchmark against which a legal system is to be assessed.[3] More often than not, it is simply treated as mere fact, indicative of the legality of a state's actions.[4] Academic commentary invariably re-traces these well-trodden paths, leaving one with the impression that the interaction between domestic and international law has been thoroughly mapped, unworthy of further enquiry. However, a different – and surprisingly pervasive – nexus between the two spheres has been largely overlooked: the use of domestic law in the interpretation of international law. The present thesis fills this gap in the literature.

This thesis aims to answer two questions: first, is domestic law used in the interpretation of international law by international courts and tribunals; and, second, is it permissible for courts and tribunals to use domestic law in this way? Despite their deceptively simple appearance, these questions raise issues that go to the very heart of interpretation itself. On what basis, for example, can we say that an interpretation is permissible in a certain context? Do the provisions of the

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[1] Domestic law is most commonly identified as a source of customary international law and general principles of law. See for example, Second Report on the Identification of Customary International Law, by Michael Wood, Special Rapporteur, UN Doc. A/CN.4/672, para 34; 2 BvR 1506/03 (German Federal Constitutional Court), para 51; R. Jennings & A. Watts, *Oppenheim's International Law*, vol. 1 (9th edn, OUP 2008), § 12; *Procès-Verbaux of the Proceedings of the Committee of Jurists, June 16th - July 24th 1920 with Annexes,* 306, 335. Similarly, 'umbrella clauses' in bilateral investment treaties enable obligations entered into under domestic law between the investor and host state to be enforced before an international investment tribunal; see for example, art 2(2) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Argentina for the Promotion and Protection of Investments, signed 11 December 1990, entered into force 19 February 1993.

[2] H. Lauterpacht, *Private Law Sources and Analogies of International Law (with special reference to international arbitration)* (Longmans, Green & Co. 1927); W. Friedmann, 'The Use of "General Principles" in the Development of International Law', (1963) 57 AJIL 279.

[3] H.L.A. Hart, *The Concept of Law* (3rd edn, OUP 2012) chp. X.

[4] See for example, *Case Concerning Certain German Interests in Polish Upper Silesia (Merits)*, 1926 PCIJ Series A, No. 7, 19.

Vienna Convention on the Law of Treaties (VCLT) constrain the choice of interpretive methods, and do they provide a framework within which interpretation can – or must – be evaluated? Are there other frameworks for evaluation that more accurately describe when and why a particular interpretation will be accepted by its addressees and others within the legal regime? Only after adequately addressing these questions will it be possible to properly examine the use of domestic law by international courts and tribunals.

This thesis is hence not a doctrinal exegesis of the place of domestic law within the Vienna Convention articles, nor does it provide an exhaustive typology of the uses of domestic law by international courts. Rather, it examines the use of domestic law in order to challenge the conventional views regarding the centrality of the Vienna Convention provisions to interpretation, whilst also providing a fresh perspective on the interaction between international and domestic law. It is only when we break free from the 'conceptual straightjacket'[5] of Article 31 that we can truly understand whether domestic law has a place in the interpretation of international law.

I. The Academic Interest in the Topic

The use of domestic law (or 'comparative reasoning') as an interpretive method of international courts has not been comprehensively addressed by any study to date.[6] The technique has been

[5] J.H.H. Weiler, 'Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century', NYU Law School Institute for International Law and Justice Colloquium: Interpretation and Judgment in International Law (14 February 2008), 5.

[6] For example, the voluminous *Interactions between International and Municipal Law* dedicates only ten pages to the use of national court decisions as precedents by international courts and tribunals. It does not examine the use of domestic legislation by international courts and tribunals at all, nor does it deal with the theoretical question of why domestic law is used; M. Fitzmaurice & C. Flinterman (eds), *Interactions between International and Municipal Law: a Comparative Law Case Study* (TMC Asser 1993) 229-39. Similarly, one paragraph is devoted to the topic in André Nollkaemper's chapter 'Conversations Amongst Courts: Domestic and International Adjudicators'; A. Nollkaemper, 'Conversations

addressed within the confines of certain sub-fields, notably within the framework of the European Court of Human Rights and the courts of the European Union.[7] However, by focussing on the reasoning of specific courts, the influence of these studies has been insulated from the mainstream general international law literature. The resulting lack of a cross-cutting analysis of the comparative reasoning has obscured the pervasiveness of technique and stymied an explanation of its theoretical underpinnings.

This stands in stark contrast to the recent proliferation of literature examining the use of comparative law by domestic courts. Spurred by a spate of highly-contentious judgments handed down by the U.S. Supreme Court in the early 2000's,[8] comparativists and constitutional lawyers have thoroughly examined the normative arguments for and against the use of comparative law by domestic courts, gathering empirical evidence to corroborate their claims.[9] This rich literature

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Amongst Courts: Domestic and International Adjudicators', in C.P.R. Romano *et al* (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 546.

[7] See for example, P. Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law', in G. Canivet *et al.* (eds), *Comparative Law before the Courts* (BIICL 2005); P.G. Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights', (1998) 73 Notre Dame Law Review 1217; K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015); K. Lenaerts, 'Interlocking Legal Orders or the European Union Variant of *E Pluribus Unum*' in Canivet *et al.*, *Comparative Law before the Courts*; M. Kiikeri, *Comparative Legal Reasoning and European Law* (Springer 2001); C.K. Kakouris, 'Use of the Comparative Method by the Court of Justice of the European Communities', (1994) Pace International Law Review 282; Y. Galmot, 'Réflexions sur le recours au droit comparé par la Cour de justice des Communautés européennes', (1990) 6 Revue française de droit administratif 255.

[8] *Graham v Florida*, 560 U.S. 48 (2010); *Roper v Simmons*, 543 U.S. 551 (2005); *Atkins v Virginia,* 536 U.S. 304 (2002); *Lawrence v Texas*, 529 U.S. 558 (2003).

[9] See for example J. Bell, 'Researching Globalisation: Lessons from Judicial Citations' (2014) 3 CJICL 961; J. Bell, 'The Argumentative Status of Foreign Legal Arguments' (2012) 8 Utrecht LR 8; G. Sitaraman, 'The Use and Abuse of Foreign Law in Constitutional Interpretation' (2009) 32 Harvard Journal of Law and Public Policy 653; V. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 Harvard LR 109; J. Waldron, 'Foreign Law and the Modern *Ius Gentium'* (2005) 119 Harvard LR 129; E.A. Young, 'Foreign Law and the Denominator Problem' (2005) 119 Harvard LR 148; N. Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer (2005) 3 International Journal of Constitutional Law 519; S. Calabresi & S. Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and The Juvenile Death Penalty Decision' (2005) 47 William & Mary LR 743; M.D. Ramsey, 'International Materials and Domestic Rights' (2004) 98 AJIL 69; A.-M. Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191. For monograph-length treatments of the topic see for example, E. Mak, *Judicial Decision-Making in a Globalised World* (Hart 2013); M. Bobek, *Comparative*

– most of which dates from the past decade – has shone a fresh light on the use of extrinsic materials by courts, allowing commentators to delve into the theoretical questions that the use of foreign law raises. Why, for example, do courts give weight to sources extrinsic to their legal system? What – if anything – constrains a judge's discretion when interpreting a provision, and what provides the benchmark against which to assess the appropriateness of an interpretation? Underpinning these debates are disagreements about the very nature and purpose of interpretation itself.

Traditionally, theoretical enquiries into interpretation, such as those prompted by domestic courts' use of foreign law, were rare in international law.[10] Instead, the principal body of literature 'simply reports how interpretation takes place in various courts and simply reports that what is done is how it should be done'.[11] However, a recent strand of literature has started to ask questions of a more theoretical nature, rejecting the orthodox approach to interpretation which has focussed almost exclusively on one type of legal obligation (treaties) and one particular interpretive methodology (the VCLT).[12] These works aim to address a range of issues that

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Reasoning in European Supreme Courts (OUP 2013); J. Waldron, *"Partly Laws Common to All Mankind": Foreign Law in American Courts* (Yale UP 2012); B. Markesinis & J. Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (UCL Press 2006).

[10] That is not to say that there has not previously been works that take an unorthodox approach to interpretation; see for example, O. Korhonen, 'New International Law: Silence, Defence or Deliverance', (1996) 7 EJIL 1; D.F. Vagts, 'Treaty Interpretation and the New American Ways of Law Reading', (1993) 4 EJIL 472; M.S. McDougal *et al*, *The Interpretation of Agreements and World Order* (Yale UP 1967).

[11] Weiler, 'A Prolegomena to a Meso-theory of Treaty Interpretation', 3.

[12] See A. Bianchi, D. Peat & M. Windsor (eds), *Interpretation in International Law* (OUP 2015); I. Venzke, *How Interpretation Makes International Law* (OUP 2012); D. Alland, 'L'interprétation du droit international public', (2012) 362 *Recueil des cours* 47; M. Waibel 'Demystifying the Art of Interpretation', (2011) 22(2) *European Journal of International Law* 571; A. Bianchi, 'Textual interpretation and (international) law reading: the myth of (in)determinacy and the genealogy of meaning' in P. Bekker *et al* (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (CUP 2010). For more orthodox approaches to interpretation in international law, see R. Gardiner, *Treaty Interpretation* (OUP 2008); O. Corten & P. Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011); U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007); M. Fitzmaurice *et a*l (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010); A. Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2014); D. Desierto *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Martinus Nijhoff 2012); R. Kolb *Interprétation et création du droit international* (Bruylant 2006).

cannot be explained by reductive reference to the provisions of the VCLT, focussing on the identity and situatedness of the interpreter, the diversity of interpretive approaches, and the process of interpretation. In taking this approach, these authors adhere to and build upon Joseph Weiler's view that 'Article 31 is both descriptively and prescriptively an "unreal" signpost of contemporary treaty interpretation'.[13]

This thesis aims to bridge the gap between the abovementioned comparative and international strands of literature. It builds on the existing comparative literature by testing the strength of normative arguments for and against the use of foreign law against the findings of recent empirical studies and examining the purchase that such arguments have in the context of international law. In the context of international law, this thesis adds to the present literature in two ways. First, it systematically documents and analyses the use of domestic law in the practice of three tribunals – the International Criminal Tribunal for the former Yugoslavia, the European Court of Human Rights, and the dispute settlement panels and Appellate Body of the World Trade Organization. Second, it builds on the theoretical strand of literature by questioning the pertinence of the Vienna Convention as an evaluative framework for interpretation, advancing an alternative framework for evaluation based on considerations of interpretive legitimacy. Only by taking such an approach can one fully account for the context in which the interpretation takes place and the values underpinning the judicial role in different legal regimes.[14]

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[13] Weiler, 'Prolegomena to a Meso-theory of Treaty Interpretation', 15.

[14] Cf. Weiler, 'A Prolegomena for a Meso-theory of Treaty Interpretation', 6-7 (stating that 'the move towards a single rule in the VCLT camouflages the funcational and other differentiating factors of treaties meaningful for international, having a chilling effect on a corresponding hermeneutic differentiation, thus undermining the functionality and/or potentiality of treaty interpretation itself.')

II. The Practical Importance of the Topic

This thesis does not aim to build on the existing literature as a purely academic endeavour; rather, it does so on the basis that the findings of this thesis will have import for those practicing international law on a day-to-day basis. It examines both whether recourse to domestic law is an established interpretive technique, and – if so – in what circumstances it is, or could be, used. This has particular relevance for those who would otherwise advance arguments based on hitherto unrecognised general principles of law, which are rarely – if ever – successful.[15] Two examples serve to illustrate the potential application of the findings of this thesis.

First, some commentators have made the argument that international investment law should be conceptualised as a system of public law.[16] Unlike international commercial arbitration, international investment law acts as a constraint on the exercise of sovereign power and hence faces analogous issues to those that have been addressed in domestic public law.[17] The similarities have led some, such as Stephan Schill, to claim that comparative public law could be used by arbitral tribunals to interpret provisions of investment treaties, such as the guarantee of fair and equitable treatment. Comparative surveys would elucidate general principles of public law – applicable by virtue of Article 31(3)(c) of the VCLT[18]– allowing tribunals to tap into the wealth of expertise that domestic legal systems embody:

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[15] M. Bogdan, 'General Principles and the Problem of Lacunae in the Law of Nations', (1977) 46 Nordic JIL 37, 50-51; A.D. Mitchell, *Legal Principles in WTO Disputes* (CUP 2008) 59. See also J. Verhoeven, *Droit International Public* (Larcier 2000) 348 ('la CIJ n'a jamais fait explicitement application d'un principe général de droit ainsi compris [i.e. from a comparative survey], même dans les matières principalement procédurales où leur utilité est réputée la plus manifeste').

[16] See S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP 2010); G. Van Harten, *Investment Treaty Arbitration and Public Law* (CUP 2008); G. Van Harten & M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', (2006) 17 EJIL 121, 145-47. For a criticism of this approach, see J. Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach', (2014) 54 VJIL 367.

[17] Van Harten & Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 146.

[18] Article 31(3)(c) provides that the interpreter *shall* take into account 'any relevant rules of international law applicable in the relations between the parties'.

> A quest for general principles of law, and engaging in comparative public law analysis, helps international investment law to benefit from the experience those legal regimes have developed not only in limiting the exercise of state powers, but also in empowering the state by illustrating its regulatory space. This may help to channel the interpretation and application of international investment treaties in ways that are in tune with the solutions that are tested and accepted in more mature systems of law and dispute resolution.[19]

Recently, a limited number of investment arbitration tribunals have shown a willingness to adopt the comparative approach in practice.[20] However, the 'quest' for general principles places a high burden on the party or tribunal advancing such a claim, leaving them open to criticisms that the comparative survey upon which the claim is based is either not sufficiently comprehensive or representative,[21] or that it lacks a proper appreciation of the social or legal context in which the domestic law functions.[22] Indeed, these critiques could be levelled at the few tribunals that have had recourse to domestic law, which frequently cite the law of only a handful of states, or simply assert that the domestic law of certain jurisdictions approaches an issue similarly without adducing evidence to support their point.[23] Recognition that domestic law might be used to interpret investment treaties even if it falls below the threshold of a general principle of law would allow international investment tribunals to draw on experience of domestic public law

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[19] S.W. Schill, 'International Investment Law and Comparative Public Law – An Introduction', in Schill (ed), *International Investment Law and Comparative Public Law,* 36.

[20] *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005), para 13; *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005), para 178; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), para 506; *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010), paras 111, 129; *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award (7 June 2012), para 166; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012), para 403; *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014), para 576.

[21] J. Ellis, 'General Principles and Comparative Law', (2011) 22 EJIL 949, 955-58, 968.

[22] J.E. Alvarez, 'Beware: Boundary Crossings', in T. Kahana & A. Schnicov (eds), *Boundaries of Right, Boundaries of State* (CUP forthcoming). pp.19, 22, 41 in draft.

[23] See *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010), para 129; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012), para 403.

whilst also avoiding the methodological difficulties involved in the induction of a general principle.

A second example of the potential utility of domestic law is in the field of liability for transboundary harm. In the latter half of the twentieth century, some authors claimed that a general principle of strict liability exists for damage caused by so-called 'ultra-hazardous' activities, such as nuclear installations.[24] These arguments were based on the ubiquity of strict liability within domestic legal systems. In the words of a UN Secretariat report on the topic:

> [I]t is evident that strict liability is a principle common to a sizeable number of countries with different legal systems, which have had the common experience of having to regulate activities to which this principle is relevant. While States may differ as to the particular application of this principle, their understanding and formulation of it are substantially similar.[25]

This claim has been vehemently criticised by others who argue that differences in the treatment of the issue on the domestic plane (for example, in relation to causation, defences, and definition of covered activities) precludes the existence of a general principle of law. As a result, the mainstream view is that strict liability for transboundary harm remains a proposition *de lege ferenda*.[26] However, if domestic law could be used in the interpretation of international law, one

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[24] P. Cahier, 'Le problème de la responsabilité pour risque en droit international', in Institut Universitaire de Hautes Études Internationales (ed), *Les relations internationales dans un monde en mutation* (IUHEI 1977) 409; J.M. Kelson, 'State Responsibility and the Abnormally Dangerous Activity', (1972) 13 Harvard JIL 197, 201-11, 227-29. See also Second Report of the Special Rapporteur on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities, UN Doc. A/CN.4/540, 26; UN Secretariat, 'Survey of Liability regimes', A/CN.4/543, para 112. The ILC ultimately adopted a series of non-binding principles on the allocation of loss in cases of transboudary harm, of which Principle 4(2) suggested that the operator should be strictly liable for damage caused; *Official Records of the General Assembly, Sixty-First Session, Supplement No. 10,* UN Doc. A/61/10, L.16.

[25] UN Secretariat, 'Survey of Liability regimes', para 112.

[26] P.-M. Dupuy, *La responsabilité internationale des États pour les dommages d'origines technologique et industrielle* (Pedone 1976) 210, 289. See also J. de Aréchaga, 'International Law in the Past Third of a Century', (1978) 159 *Recueil des cours* 1, 273; R. Lefeber, *Transboundary Enviromental Interference and the Origin of State Liability* (Kluwer 1996) 230.

might nevertheless argue that domestic rules of no-fault liability could be given effect through the interpretation of extant legal obligations.[27]

The topic of this thesis has both theoretical and practical importance, illuminating elements of interpretation that have hitherto lay in the shade, whilst also examining if comparative arguments that fall short of constituting a general principle might nevertheless have purchase before international courts and tribunals.

III. The Approach of This Thesis

i. Comparative International Law

Methodologically, this thesis adopts a comparative approach. Whilst shedding light on the different contexts and circumstances in which domestic law is used, this approach allows us to address the broader question of whether and why diverse interpretive methodologies are accepted 'under the sign of equality' of the VCLT.[28]

Recently, comparative methodologies have experienced a renaissance amongst international lawyers.[29] Prompted by the writings of Anthea Roberts and others, there has been a trend in the

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[27] One extant legal obligation that could be interpreted with reference to domestic law might be the principle of 'abuse of rights' (*abus de droit*); see M. Byers, 'Abuse of Rights: An Old Principle, A New Age', (2002) 47 McGill LJ 389; R. Kolb, *La Bonne Foi* (Presses Universitaires de France 2000); A.-C. Kiss, *L'abus de droit en droit international* (L.G.D.J. 1953). For a critical approach to the application of the abuse of rights theory in international law, see J.-D. Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Imprimerie Centrale S.A. 1958).

[28] J. Arato, 'Accounting for Difference in Treaty Interpretation over Time', in A. Bianchi, D. Peat, & M. Windsor (eds), *Interpretation in International Law* (OUP 2015) 206 ('faced with the familiar paradox of accounting for difference under the sign of equality, the question of the day is how to *explain* such differential treatment within the law of treaties.')

[29] On the diversity of comparative methodologies, see M. Siems, 'The Methods of Comparative Corporate Law', in R. Tomasic (ed.), *Routledge Handbook of Corporate Law* (Routledge 2016 forthcoming) (distinguishing between rule-based comparison, functional comparison, broader/legal system comparison, comparative law in context, historical comparative perspective, transnational and comparative law, and applied comparative law).

literature to examine how domestic courts have internalised international law into their practice, as well as the methods by which international law may be identified or interpreted in light of domestic court judgments.[30] This nascent movement, which questions the very notion of the universality of international law, has been termed 'comparative international law'.

The present thesis does not fit squarely within this new line of international legal thought, predominantly because it examines the reasoning of international and not domestic courts. Yet it shares some of the same underlying intuitions. Just as the project of comparative international law is based on the idea that the application of international law cannot be divorced from the legal and social context in which it occurs,[31] so too is the approach of this thesis based on the belief that interpretation is inextricably coloured by the values of the international legal regime in which it takes place.[32] And just as comparative international law aims to shed new light on the oft-discussed relationship between the national and international law, this thesis challenges the traditional views regarding the interaction between the two spheres. The approach taken here therefore complements the nascent comparative international law movement, demonstrating that the adoption of a comparative methodology has a place outside an examination of the domestic application of international law.

ii. The Scope of this Thesis

A few words need to said regarding exactly what is being compared, why those are appropriate comparisons, and why such choices have been made. First, the scope of this thesis is limited to the interpretation of international law by international courts and tribunals. It is clear that the

[30] See A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', (2011) 60 ICLQ 57; 'Comparative International Law: Symposium', AJIL forthcoming; A. Roberts *et al.* (eds), *Comparative International Law* (OUP forthcoming).
[31] K. Knop, 'Here and There: International Law in Domestic Courts', (2000) NYU JILP 501, 505-06. See also M. Koskenniemi, 'The Case for Comparative International Law', (2009) 20 Finnish YBIL 1, 3.
[32] Cf. Koskenniemi, 'The Case for Comparative International Law', 6.

bulk of the day-to-day life of international law is constituted by the practice of non-judicial bodies, such as government legal advisors. However, the availability of the interpretive practice of these actors is limited, with only a handful of states producing edited collections of materials that could be drawn on. On the other hand, the practice of the courts and tribunals examined in this thesis is easily accessible by virtue of publicly-available, electronic distributions of judgments. The focus on judicial practice is hence more a function of practical considerations rather than a reflection of the relative import of judicial institutions in international law.[33]

Second, the particular jurisdictions chosen – the International Criminal Tribunal for the former Yugoslavia (ICTY), the European Court of Human Rights (ECtHR), and the panels and Appellate Body of the World Trade Organization (WTO) – were selected to demonstrate the use of domestic law over a wide range of subject matter and within a diversity of legal regimes. These case studies should not be taken as representative of the use of domestic law by all international courts and tribunals. Rather, they are intended to serve as illustrative examples that allow us to answer the two guiding questions of the thesis outlined above: namely, is – and should – domestic law be used in the interpretation of international law? By using a diverse range of case studies, we are better able to appreciate how context, circumstances, and subject matter affect courts' invocation of domestic law.

Third, the scope of this thesis is limited to an examination of the use of comparative *domestic* law by international courts and tribunals. It should be noted, however, that the case law of other international jurisdictions is also frequently drawn on in the interpretation of international law. For example, the ICTY has used the case law of the ECtHR in the context of examining when a

[33] Cf. Weiler, 'A Prolegomena to a Meso-theory of Treaty Interpretation', 10. Although for a different viewpoint, see G. Hernández, 'Interpretative Authority and the International Judiciary', in A. Bianchi, D. Peat, & M. Windsor (eds), *Interpretation in International Law*.

defendant is unfit to stand trial,[34] investment tribunals have drawn on the reports of the WTO AB in order to elaborate what is required by 'necessity',[35] and the ECtHR has made numerous references to the case-law of the Inter-American Court of Human Rights.[36] This thesis focuses on the use of domestic law for two reasons. First, unlike the use of case-law of international courts and tribunals, which has been the focus of recent commentary,[37] the use of domestic law has never been the subject of sustained academic attention, despite the evident interest of such a study. Second, the use of domestic law raises questions regarding not only the appropriateness of drawing on law from another regime, but also of transposing the law from the domestic to international level. To be sure, questions of transposition are also relevant in relation to the citation of other international tribunals' case-law.[38] However the use of domestic law forces us to revisit the age-old question of if and when domestic law should act as a source or inspiration for international law. Reference to 'comparative law' in this thesis should therefore be understood as referring to comparative domestic law.

Fourth, this thesis focuses on non-mandatory uses of domestic law by courts.[39] In other words, it examines the use of domestic law when the court or tribunal is not legally obliged to have reference to such law. As a result, it is not concerned with cases in which domestic law is cited as indicative of customary international law or a general principle of law, and hence must 'taken

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[34] *Prosecutor v Strugar* (Appeals Chamber Judgement) IT-01-42-A (17 July 2008), para 47.

[35] *Continental Casualty Company v The Argentine Republic*, ICSID Case No. ARB/03/9, Award (8 September 2008), para 192. On the use of extraneous precedent by international investment tribunals more generally, see A.K. Bjorklund & S. Nappert, 'Beyond Fragmentation', in T. Weiler & F. Baetens (eds), *New Directions in International Economic Law*: *In Memoriam Thomas Wälde* (Brill 2011).

[36] See for example, *Sergey Zolotukhin v Russia* (10 February 2009), App. No. 14939/03, para 40. See more generally, ECHR, *References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights: Research Report* (Council of Europe 2012); G. Ulfstein, 'Interpretation of the ECHR in light of other international instruments', Pluricourts Research Paper No. 15-05.

[37] See in particular, H.G. Cohen, 'Theorizing Precedent in International Law', in A. Bianchi, D. Peat, & M. Windsor (eds), *Interpretation in International Law*; Bjorklund & Nappert, 'Beyond Fragmentation'.

[38] See for example, Jose Alvarez's critique of the use of WTO jurisprudence by the tribunal in *Continental Casualty*; Alvarez, 'Beware: Boundary Crossings'.

[39] Cf. M. Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013) 20-33.

into account' by the interpreter as relevant rules of international law under Article 31(3)(c) of the Vienna Convention, nor does it examine cases in which domestic law is designated as the applicable law (as is typically the case in investment arbitration).[40] Similarly, it does not deal with instances in which there is an implicit or explicit *renvoi* to domestic law in the international law being interpreted, such as whether an alien has been expelled pursuant to a decision reached 'in accordance with the [domestic] law',[41] or whether nationality has been properly conferred for the purposes of exercising diplomatic protection.[42] The reason for referring to domestic law in these instances is reasonably clear: it is either implicitly or explicitly mandated by the international law itself.[43] A more challenging question is when and why courts use domestic law to interpret international rules when such reference is non-mandatory.

iii. Outline of the Thesis

This thesis is composed of two parts, each of which is composed of three chapters. Part One lays the theoretical foundations for the topic, whilst Part Two applies the evaluative framework elaborated in Part One to the practice of three tribunals – the ICTY, ECtHR, and the dispute settlement tribunals of the WTO.

Drawing on the wealth of literature that has recently been published on the topic, Chapter One examines the normative arguments made for and against the use of comparative law and

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[40] See for example, art 2(2) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Argentina for the Promotion and Protection of Investments, signed 11 December 1990, entered into force 19 February 1993.

[41] See for example, *Case Concerning Ahmadou Sadio Diallo (Guinea v DRC)* (Judgment) (30 November 2010) (2010) ICJ Rep. 639, paras 64-74.

[42] *Prosecutor v Erdemović* (Appeals Chamber Judgement) IT-96-22-A (7 October 1997), Separate and Dissenting Opinion of Judge Cassese, para 3. See also, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) (2010) ICJ Rep. 83, para 205 (stating that 'it is for each State to determine in its domestic legislation ... the specific content of the environmental impact assessment required [under customary internatioanl law]').

[43] For a comprehensive survey of the application of domestic law by international courts and tribunals in these situations, see J. Ketcheson, *The Application of Domestic Law by International Tribunals* (Ph.D. Thesis, University of Cambridge 2013).

continues to assess which of these arguments find support in the empirical work on the topic. It uses these findings to posit three hypotheses for the use of domestic law by international courts: (1) the use of domestic law depends on the character of the law being interpreted; (2) different jurisdictions – for example, those operating within a nascent political system – are more likely to draw inspiration from outside their own legal system; and (3) the use of domestic law is an auxiliary, not a free-standing, argument.

Chapters Two and Three address the question of whether the use of domestic law is permissible. It might be thought that this could be addressed perfunctorily by reference to Articles 31 and 32 of the Vienna Convention, which have been labelled by some as 'fixed rules [which] do not permit the interpreter a free choice among interpretive methods'.[44] Surely, if we want to work out whether reference to domestic law is permissible, all we need to do is refer to the provisions of the VCLT? Chapter Two argues that this is not the case. The flexibility that was intentionally afforded to the interpreter by the International Law Commission means that virtually any interpretation could be justified in reference to the VCLT articles. As a result, the VCLT does not tell us whether an interpretation is appropriate in any particular context. In order to determine this, we must move beyond the Vienna Convention to an evaluative framework that can account for the context-specificity of interpretation: Chapter Three elaborates such a framework. It draws on the 'turn to legitimacy' in criminological literature as inspiration for a tri-partite definition of a legitimate interpretation. By adopting this framework, we are able to understand why certain interpretive approaches are accepted in some contexts and not in others, highlighting the pivotal role that the perceived values of the legal regime play in the acceptability of interpretations.

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[44] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 309.

Part Two examines and analyses the use of domestic law by three courts and tribunals within the legitimacy framework elaborated in Chapter Three. Chapter Four examines the use of domestic law by the ICTY, which – faced with scant precedent and a vague statute – turned to domestic law to elaborate the definitions of crimes under its jurisdiction, as well as to interpret rules of procedure and evidence imported from the domestic sphere.

Chapter Five looks at the use of consensus in the reasoning of the ECtHR. From the early days of the Court, it has drawn on the domestic law of Council of Europe member states to interpret the provisions of the Convention. The Court's use of consensus has been the subject of a great variety of commentary: some have criticised it as unduly deferential to states, whilst others have lauded it as an important legitimising tool in the Court's arsenal. Chapter Five examines how frequently and for which provisions consensus is used. It finds that in the overwhelming majority of cases, consensus is used to interpret 'standards of conduct', such as fairness, necessity or due diligence, which cannot *but* be interpreted by reference to the accepted conduct within that community.

Chapter Six surveys the use of domestic law in the practice of the panels and AB of the WTO, which demonstrates how the use of domestic law may be justified in reference to the provisions of the VCLT. Within the WTO, domestic law has been recognised as constituting subsequent practice and as evidence of special meanings. However, of particular interest is the use of domestic law as a 'circumstance of conclusion' of a treaty: in certain contexts, the AB has upheld the reliance of complainant members on the domestic law of the respondent state. This places a burden on states to be aware of the domestic law of other members, which can only be understood with reference to the avowed values underpinning the WTO Dispute Settlement Mechanism; namely, the security and predictability of international trade.

By examining a little-known interpretive technique that has attracted scant attention, this thesis provides something of interest for practitioners whose day-to-day life is constituted by act of interpretation whilst also addressing fundamental questions that will be of interest for the theoretician.

Part One

1.

COMPARATIVE REASONING IN DOMESTIC COURTS

INTRODUCTION

In the 2005 case of *Roper v Simmons*, the Supreme Court of the United States was called upon to determine the legality of a Missouri law permitting the execution of minors.[1] At the time of judgment, the U.S. stood alone in the world as the only state that executed those who committed a crime under the age of 18. The majority of the Court thought it only proper to acknowledge the 'overwhelming weight of international opinion against the juvenile death penalty' in holding that the death penalty breached the Eighth Amendment prohibition on 'cruel and unusual treatment'. Members of the minority, however, vociferously denounced the import placed on foreign law by the majority,[2] with Justice Scalia chastising the 'brave new meaning' that the Court had given to the prohibition.[3]

Whilst Scalia evoked Aldous Huxley's dystopian vision of the future to damningly indict the 'sophist' reasoning of the majority,[4] 'brave new world' has not always carried this negative connotation. In Shakespeare's *The Tempest,* Miranda, when confronted by sailors washed ashore to a deserted island upon which she is marooned, salutes the 'brave new world, that hath such creatures in it!'[5] Is the use of foreign laws by domestic courts something to be decried for fear of a dystopian vision of the future, or does it offer the 'brave new world' imagined by Miranda, full

1 *Roper v Simmons*, 543 U.S. 551 (2005).
2 *Roper,* 578 (Kennedy J., for the Court).
3 A. Huxley, *Brave New World* (Vintage Classics 2007).
4 *Roper,* 624 (Scalia J., dissenting).
5 W. Shakespeare, *The Tempest*, Act 5, Scene 1. This link is noted in V. Jackson, 'Constitutional Law and Transnational Comparisons: The *Youngstown* Decision and American Exceptionalism' (2006) 30 Harvard Journal of Law and Public Policy 191.

of possibilities and potential?[6] This chapter examines the arguments on each side of this debate in U.S. and comparative law literature, as well as empirical research that has been conducted on the citation of foreign sources.

The renewed interest in the debate surrounding the citation of foreign laws has been prompted by a string of highly politicised judgments delivered by the U.S. Supreme Court in the early 2000's in which foreign laws were used in the reasoning of the majority.[7] Alongside *Roper,* one could count the 2003 case of *Lawrence v Texas,* in which the Court struck down a Texas statute outlawing homosexual sodomy by referring to the case law of the European Court of Human Rights, a British Parliamentary Report, and the law of 'other nations.'[8] Similarly, in the 2010 case of *Graham v Florida*, the Court noted that the U.S. was the only state to sentence minors to life imprisonment without parole for non-homicide offences, justifying its reliance on foreign law in the following terms:

> The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.[9]

This string of Eighth Amendment cases has coloured the academic debate in the U.S., which has focused on the appropriateness of the use of foreign law in constitutional interpretation.[10] As

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[6] It is perhaps ironic that Justice Scalia, a committed Originalist, made reference to the contemporary connotation of the term when chastising the majority's interpretation, ignoring its Shakespearian origins.

[7] See further, J. Toobin, *The Nine: Inside the Secret World of the Supreme Court* (Anchor Books 2007) 225-32.

[8] *Lawrence v Texas*, 529 U.S. 558 (2003), 572-73, 576 (Kennedy J., for the Court).

[9] *Graham v Florida*, 560 U.S. 48 (2010), 82 (Kennedy J., for the Court). See also *Atkins v Virginia,* 536 U.S. 304, 321 (2002) (Stevens J., for the Court).

[10] Amongst the voluminous literature, see in particular G. Sitaraman, 'The Use and Abuse of Foreign Law in Constitutional Interpretation' (2009) 32 Harvard Journal of Law and Public Policy 653; V. Jackson, 'Constitutional

with debates surrounding U.S. constitutional law more generally, the opposing camps are split along ideological lines, with conservatives abhorring the use of foreign law[11] and liberals expounding the potential benefits of its use.[12] Whilst the U.S. debate provides fertile ground for an examination of the arguments made for and against the use of foreign law, authors have noted that neither this phenomenon, nor the controversy surrounding it, is new.[13] The renewed interest has spilled over into an examination of the use of foreign law in the interpretation of non-constitutional fields of law, as well as prompting a number of empirical analyses of the practice. Moreover, the debate in the U.S. has prompted academics in other jurisdictions to engage with domestic courts' use of foreign law, leading to the publication of a veritable multitude of academic works addressing the topic in the past 15 years.[14]

This chapter sketches out the contours of the contemporary debate regarding the use of foreign laws by domestic courts in the interpretation of national law. The use of foreign laws by

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Comparisons: Convergence, Resistance, Engagement' (2005) 119 Harvard LR 109; J. Waldron, 'Foreign Law and the Modern *Ius Gentium'* (2005) 119 Harvard LR 129; E.A. Young, 'Foreign Law and the Denominator Problem' (2005) 119 Harvard LR 148; N. Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 International Journal of Constitutional Law 519; S. Calabresi & S. Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and The Juvenile Death Penalty Decision' (2005) 47 William & Mary LR 743; M.D. Ramsey, 'International Materials and Domestic Rights' (2004) 98 AJIL 69; A.-M. Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191.

[11] See for example, F.H. Easterbrook, 'Foreign Sources and the American Constitution' (2006) 30 Harvard Journal of Law and Public Policy 223, 227-28.

[12] See for example, R. Bader Ginsburg, '"Decent Respect for the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication' (2005) 64 CLJ 575.

[13] See for example, *Cummings v Missouri,* 71 U.S. (4 Wall.) 277, 318, 320-21 (1867) (referring to English and French law to determine whether a Missouri statute breached the Constitution's Article 1, Section 10 ban on *ex post facto* laws or Bills of Attainder); *Wilkerson v Utah* 99 U.S. 130 (1879), 134-35 (relying on English law to interpret the Eighth Amendment); for further cases, see Jackson, 'Constitutional Comparisons', fn 4. For an early academic analysis of the utility of foreign law, see F. Gény, *Méthode d'interprétation et sources en droit privé positif* vol. 2 (2nd edn, LGDJ 1919) 274.

[14] For monograph-length treatments of the topic see for example, E. Mak, *Judicial Decision-Making in a Globalised World* (Hart 2013); M. Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013); J. Waldron, *"Partly Laws Common to All Mankind": Foreign Law in American Courts* (Yale UP 2012); B. Markesinis & J. Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (UCL Press 2006). See also J. Bell, 'Researching Globalisation: Lessons from Judicial Citations' (2014) 3 CJICL 961; J. Bell, 'The Argumentative Status of Foreign Legal Arguments' (2012) 8 Utrecht LR 8.

domestic courts is analogous to the use of domestic law by international courts and tribunals in several important ways. First, both draw on laws from outside the legal system in which the court operates, raising questions of the appropriateness of drawing upon such extra-systemic law.[15] Does the fact that the importing system has had no part in the creation of the law advocate against its use, or do contextual considerations mean that laws will only ever be appropriate for the system in which they were created?[16] A second similarity is that both the domestic courts' use of foreign law and the international tribunals' use of domestic law examined in this thesis are 'non-mandatory';[17] in other words, the law being interpreted does not *require* such extra-systemic reference. This raises questions of the circumstances in which judges should look outside their legal system for insights or inspiration, and to what extent the limits of the judicial function should preclude them from making such reference.[18]

The domestic literature on the subject acts as a guide for the present study by addressing questions that are analogous to those raised by the use of domestic law by international courts and tribunals. These questions include: what are the arguments for and against reference to non-mandatory sources of law foreign to the jurisdiction? In which circumstances are courts most likely to have recourse to foreign law, and what areas of law are most susceptible to the use of foreign law? What factors determine which foreign law is used in a particular instance?

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[15] Extra-systemic law refers to law from outside the court's own legal system. In the context of domestic courts, this refers to foreign law, whilst in the context of international courts, this refers to the use of domestic law.

[16] For an analogous point in relation to legal transplants, see P. Legrand, 'What "Legal Transplants?"' in D. Nelken & J. Feest (eds), *Adapting Legal Culture* (Hart 2001) 59, 68.

[17] The mandatory/non-mandatory distinction is drawn from Bobek, *Comparative Reasoning*, 20-33. Cf. B. Flanagan & S. Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60 ICLQ 1, 5-6.

[18] One can think of certain 'mandatory' applications of extra-systemic law: for example, in the English legal system, a court must normally apply the (foreign) applicable law of a contract chosen by the parties by virtue of Article 3 of the Rome I regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)). Similarly in international law, some rules require reference to the domestic law of a state. See for example, the application of Article 13 of the International Covenant of Civil and Political Rights, which requires that an alien may be expelled pursuant to a decision reached 'in accordance with the law', by the International Court of Justice in the *Diallo* case; *Case Concerning Ahmadou Sadio Diallo (Guinea v DRC)* (Judgment) (30 November 2010) (2010) ICJ Rep. 639, paras 64-74.

The chapter is divided into four sections. The first and second sections address the normative arguments adduced against and for the use of foreign law by domestic courts, respectively. These can be divided into claims related to liberal democracy and methodological pitfalls on the one hand, and claims of universalism and the benefits of learning from other systems on the other hand. The third section surveys recent empirical works that have studied the topic, addressing issues such as the frequency with which the technique is adopted, the fields of law in which foreign law is most often used, the ideological leanings of judges that cite domestic law, and which countries' laws are commonly cited. This section summarises the normative arguments that find support in the empirical studies, which provide a useful heuristic framework within which to consider the use of domestic law by international courts and tribunals. The chapter concludes by positing three hypotheses for the use of domestic law by international courts and tribunals, which are drawn from the works surveyed in this chapter.

I. Arguments Against the use of Foreign Law

Behind the vitriolic denouncement of the use of foreign law that is characterised by the conservative movement in the U.S., there are well-reasoned and persuasive arguments to reject the use of foreign law. The main arguments advanced by critics of the use of foreign law by domestic courts are two-fold.[19] First, critics argue that the use of foreign law undermines the democratic law-making processes, encroaching upon the sovereignty of the domestic system. Second, critics voice a variety of methodological concerns including the claim that judges selectively pick the foreign laws that support their argument, and that the comparative studies conducted are inadequate from both a quantitative and qualitative point of view.

[19] Sitaraman, 'The Use and Abuse of Foreign Law', 657.

i. The Liberal Democracy Argument

Why should the views of 'like-minded foreigners'[20] hold any weight in a domestic legal system? Surely, domestic law in a liberal democracy is enacted by the representatives of citizens in response to societal needs and gives effect to the values that the community holds dear? This is even more the case with constitutional law, which is presumed to reflect the innermost values of its citizens. As has been noted, 'the specificity of constitutional ideas to the nation is important, and the maintenance of a distinct constitutional culture is dependent on decisions being both created by and accountable to the people within the country.'[21]

According to this argument, reference to foreign law is to be avoided for two reasons: first, it is not made in response to the needs of the particular domestic community; second – and more damningly – it undercuts the legislative (and constitutional) processes upon which law-making within the polity rests. Moreover, 'given the centrality of democracy, unelected judges are in the worst positions amongst the three branches of government to determine fundamental issues of national values.'[22] Whilst the critique based on liberal democracy admits that the ideas foreign laws embody might well be useful for the resolution of domestic problems, it argues that it is for the legislature – and not the courts – to draw inspiration from abroad.[23]

In relation to constitutional law, the purchase of this argument depends on the conception of a constitutionalism that one subscribes to. In his examination of the different treatment of international law in European and U.S. constitutional systems, Jed Rubenfeld draws an useful distinction between democratic constitutionalism and international constitutionalism. The

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[20] *Roper*, 608 (Scalia J., dissenting).
[21] Sitaraman, 'The Use and Abuse of Foreign Law', 659.
[22] Sitaraman, 'The Use and Abuse of Foreign Law', 659.
[23] M. Gelter & M. Siems, 'Citations to Foreign Courts-Illegitimate and Superfluous, or Unavoidable? Evidence from Europe' (2014) 62 American Journal of Comparative Law 35, 40.

former, exemplified by U.S. constitutionalism, conceives of constitutionalism as 'an inaugurating or foundational act of democratic self-governance' that 'a particular polity has given itself through a special act of popular law-making'.[24] The latter, on the other hand, considers constitutionalism 'not as an act of democracy, but as a set of checks or restraints on democracy', a view which emerged as the dominant one in Europe post-World War II.[25] The import of this distinction is the following: if one considers that constitutional rights represent 'the nation's self-given law', reference to foreign law is anathema, which will – and should – be decried as if 'in the presence of the spores of a new virus'.[26] On the other hand, if one considers that constitutional law is a positive embodiment of a corpus of law that transcends democratically-enacted law, reference to foreign law might not only be acceptable, but is perhaps even to be desired, allowing universal rights to be given expression unencumbered by 'internal, partisan, and ideological political disputes'.[27]

Rubenfeld's distinction highlights some of the limitations of the argument against the use of foreign law from liberal democracy in relation to constitutional law. First, the argument rests upon a certain conception of democratic constitutionalism that is prevalent in the U.S., but one which certainly does not ring true worldwide. In many African and European states, for example, the idea that there are transcendental rights protected against state or majority interference forms the very basis of human rights.[28] Democratic validation of law no longer has the final word as to which laws are enforceable within a society.

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[24] J. Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79 NYU LR 1971, 1975. Cf. Bobek, *Comparative Reasoning,* 237-40.

[25] Rubenfeld, 'Unilateralism and Constitutionalism', 1975, 1991-93.

[26] Rubenfeld, 'Unilateralism and Constitutionalism', 1997.

[27] Rubenfeld, 'Unilateralism and Constitutionalism', 1994.

[28] E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 NYU JILP 843, 850. See further, M. Killander, 'African Human Rights Law in Theory and Practice', in S. Joseph & A. McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010). The situation in Asia and the Islamic world with regards to human rights is more complex; see M.C. David, 'The Political Economy and Culture of Human Rights in

Moreover, one could question how much the idea still holds true for the U.S. Take the Eighth Amendment prohibition on cruel and unusual punishments as an example. In several international conventions, the U.S. has subscribed to the view that such a prohibition 'derives from the inherent dignity of the human person'.[29] Whilst these are analogous provisions accepted in international treaties, it would be odd to maintain that the prohibition embodied in the Eighth Amendment nevertheless *solely* draws its authority from its democratic roots, neglecting the purportedly universal character of the prohibition that the U.S. has recognised in other documents.[30] One might well admit that the rights enshrined in the U.S. constitution were given effect by democratic means in the late Eighteenth century, but that does not mean that their authority necessarily comes from such sources in the twenty-first century.

In relation to 'standard' law that does not involve fundamental rights, the argument against the use of foreign law might be stronger. Within a domestic system, one presumes that the legislature is better placed to discern the concerns and values of a society (and respond accordingly) than the judiciary. A democratic legislature represents the views of the population whereas the judiciary is selected from a small, normally unrepresentative, subset of society.[31] It is

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East Asia', in S. Joseph & A. McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 430-38; A.A. An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate', (2000) 94 ASIL Proceedings 95.

[29] Preamble and Article 16, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment; see also Preamble and Article 7, International Covenant on the Protection of Civil and Political Rights. The U.S. acceded to the CAT and ICCPR in 1994 and 1992, respectively.

[30] Gerald Neuman notes that the U.S. constitution does not exactly align with 'modern human rights texts'; G.L. Neuman, 'The Uses of International Law in Constitutional Interpretation' (2004) 98 AJIL 82, 86.

[31] Cf. A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2012) 51. See also *Handyside v U.K.,* 7 December 1976, App. No. 5493/72, para 49 (recognising that 'By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions'); *R v DPP ex parte Kebeline*, [2002] 2 AC 366, 381 (*per* Lord Hope) (stating that 'difficult choices may need to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body ... It will be easier for it to be recognised where the issues involve questions of social or economic policy...').

a fortiori the case that a national legislature is better placed to address those problems than foreign legislatures or judiciaries. This contention is uncontroversial. However, foreign law is frequently used when the courts are faced with a novel problem that has not explicitly been the subject of legislation.[32] The pertinent question from the point of view of liberal democracy then becomes how far should judges be allowed to draw on extra-systemic sources in the absence of clearly-applicable legislation? The response to this rests on the extent to which democratic considerations might be overruled by normative arguments for the use of foreign law, examined in the following section.[33]

ii. The Cherry Picking Argument

The methodological critiques levelled at the use of foreign law are usually one of two kinds. First, opponents claim that those who use foreign law 'cherry pick' the laws that support their personal values without paying attention to contradictory points of view. Second, they contend that those that draw on foreign law conduct flawed analyses of the law; for example, judges do not appropriately account for the context of the foreign law within the larger legal system.[34]

Chief Justice John Roberts of the U.S. Supreme Court vividly described the 'cherry picking' argument – the criticism that is most commonly levelled against the use of foreign law[35] – in the following terms at his confirmation hearing:

> Foreign Law. You can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd

[32] Bobek, *Comparative Reasoning*, 210.
[33] Waldron, *"Partly Laws"*, 152.
[34] Bobek, *Comparative Reasoning*, 240-44. See also Waldron, *"Partly Laws"*, 171-76.
[35] Waldron, *"Partly Laws"*, 171.

> and picking out your friends ... It allows the judge to incorporate his or her own personal preferences, [and] cloak them with the authority of precedent...[36]

And yet, judges select all the time. They select the precedents they use,[37] the historical sources that they rely on,[38] and the separate or dissenting opinions they draw on. Indeed, they select to such an extent that one judge has commented that the 'very process of adjudication implies a selection'.[39] So why should the selection of foreign laws be singled out as being a particularly egregious methodological error?

The cherry picking argument rests on the assumption that – in order to be successful – the comparative survey of foreign law conducted must be exhaustive (or at least representative) to meet the expected standard of 'scientific rationality and objectivity.'[40] Yet, there is nothing to say that this standard is valid and applicable to the use of foreign law by domestic courts. Rather, it is the 'mechanical projection' of 'the aims of (scholarly) scientific research and corresponding precision required therein into the judicial use of comparative arguments.'[41] Instead, the breadth and depth of the comparative survey required must depend on the exact argument proffered for the use of foreign law.[42] Judges that wish to just look to domestic laws for inspiration, for example, 'need (in fact quite shallow) inspiration or argumentative support, not deep-level contextualised scientific 'truth'.'[43] For these judges, there is nothing 'magic' about absolute comprehensiveness: 'we can learn from foreign decisions one by one or in clusters or in

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[36] U.S. Senate Committee on the Judiciary, 'Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, September 12-15, 2005', Serial No. J-109-37, 201. See also R.A. Posner, 'The Supreme Court 2004 Term - Foreword: A Political Court' (2005) 119 Harvard LR 32, 86.
[37] Waldron, *"Partly Laws"*, 172.
[38] J.S. Sutton, 'The Role of History in Judging Disputes about the Meaning of the Constitution' (2009) 41 Texas Tech LR 1173, 1185.
[39] Justice Moseneke in U. Bentele, 'Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law' (2009) 37 Georgia Journal of International and Comparative Law 219, 239.
[40] Bobek, *Comparative Reasoning*, 243.
[41] Bobek, *Comparative Reasoning*, 242.
[42] Waldron, *"Partly Laws"*, 175.
[43] Bobek, *Comparative Reasoning*, 242-43.

something approaching a world consensus."[44] That is not to say that the cherry picking critique has no validity, but rather that its purchase depends on the particular justification proffered for the use of foreign law. This idea will be developed in the following section.

iii. The Accuracy Argument

The second strain of methodological critique is based on the idea that judges cannot fully comprehend the legal, political, social and historical context of the foreign law that they use.[45] For efficiency, these are cumulatively termed the 'argument against from accuracy'.[46] Such accuracy is, according to some, at the very heart of the study of comparative law. For example, take Sir Basil Markesinis' view that 'It is thus one of the primary functions of the comparatist to warn national lawyers against the danger of thinking that they can understand foreign law simply because they have mastered a foreign language. The exegesis of foreign law is an art that has to be learned...'[47] Moreover, even if judges were endowed with the requisite skills – linguistic, research, or otherwise – to conduct such research, the time, effort, and expense that would be involved in such a process might prove to be inordinate.[48]

As with the cherry picking argument, this methodological concern must be viewed in light of the diversity of arguments invoked for the use of foreign law. For example, if a judge imports a legal institution wholesale from a foreign system, then clearly the judge must take into account contextual differences between the donor and host state in order to ensure effective functioning of the transported institution. On the other hand, if the judge simply uses the foreign law as a

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[44] Waldron, *"Partly Laws"*, 175.

[45] Sitaraman, 'The Use and Abuse of Foreign Law', 661-64. It seems that at least some judges themselves are aware of the difficulty of taking sufficient account of the legal, social and cultural context; Flanagan & Ahern, 'Judicial Decision-Making and Transnational Law', 21.

[46] This is the term used by Ganesh Sitaraman; Sitaraman, 'The Use and Abuse of Foreign Law', 661-64.

[47] B. Markesinis, 'National Self-Sufficiency or Intellectual Arrogance? The Current Attitude of American Courts Towards Foreign Law' (2006) 65 CLJ 301, 306.

[48] Young, 'Foreign Law', 165-66.

'sounding board' for their ideas,[49] then an enquiry into the context and history of the provision might prove superfluous. The methodological standard to which judges should be held must be linked to the purposes for which they draw on foreign law in the case at hand.

Ultimately, the need to account for different circumstances does not provide an argument against the use of foreign law in the future.[50] Instead, it simply provides a prudent reminder that the foreign laws drawn upon should be used with caution and contextualised according to the purpose that they serve.[51]

The methodological critiques levelled at the use of foreign law depend on a certain vision of the appropriate method transposed from the scholarly realm, in which it is the job of comparative law to present a representative, comprehensive, contextualised survey of the legal approaches taken in different systems. This presupposes too much. Methodological concerns have a place in an examination of the judicial use of foreign law, but these concerns must be tailored to the justification for recourse to foreign law advanced (or presupposed) by the court. An argument based on the universal character of a fundamental right will need to adopt a significantly different method to an examination of a neighbouring state's application of a bilateral treaty.

II. Arguments for the use Foreign Law

In the literature, the arguments adduced to support the use of foreign law are of three varieties. The first, termed here the 'argument from universality', is premised on the idea that judges are engaged in the interpretation and application of the same universal concept. As a result, judges may usefully consult the case law of other jurisdictions in order to inform their interpretation of

[49] See the theories of Vicki Jackson and Anne-Marie Slaughter, outlined below at pp 39-40.
[50] Waldron, *"Partly Laws"*, 181.
[51] See also, Mak, *Judicial Decision-Making*, 205.

the concept. The second argument for the use of foreign law – and the one that is preponderant in the literature – is the 'learning' argument. According to different strands of this argument, it may be instructive for judges to examine the law of foreign jurisdictions to see how cognate issues have been addressed elsewhere, to shed light upon the possible effects of a certain decision, or to aid reflection on the meaning of one's own domestic law. Sitting in between these two schools of thought is the argument, advanced by Jeremy Waldron, that judges are involved in a common endeavour of addressing contemporary problems using a certain, legal method of reasoning. The unity forged by this common endeavour – and not the universality of the concepts subject to interpretation – provides the normative argument for reference to the case law of other jurisdictions.

i. The Universality Argument

As noted above, the most recent series of cases in which the U.S. Supreme Court has had recourse to foreign law heavily influenced the academic commentary dealing with the subject, in particular causing it to focus on the interpretation of constitutional rights. The provision of the U.S. Constitution at issue in *Roper, Lawrence* and *Graham* was the Eighth Amendment, specifically the prohibition of 'cruel and unusual punishment'. This prohibition has obvious parallels in other constitutional and human rights legislation around the world (notably Article 3 of the European Convention on Human Rights (ECHR)),[52] giving support to those that claim such a prohibition constitutes a human right.[53]

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[52] Article 3 ECHR provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

[53] See for example, Article 10 of the English Bill of Rights 1689; Article 9 of the New Zealand Bill of Rights Act 1990; Section 12 of the Canadian Charter of Rights; Article 7 of the International Covenant on Civil and Political Rights; Supreme Court of India, *Mullin v Administrator, Union Territory of Delhi,* AIR 1981 SC 746; Supreme Court of Israel, *Public Committee Against Torture in Israel v Israel*, (1999) 7 BHRC 31, 45g-46a. See further the jurisdictions referred to in R. Clayton & H. Tomlinson, *The Law of Human Rights* vol 1 (OUP 2000) 418-29.

The supposed universal nature of this right gives rise to an argument for consistent application throughout all states in the world. As aptly put by Jeremy Waldron, 'what each of these countries is administering under its Bill or Charter of Rights are human rights, and human rights, being based on universal principles, are surely the same the world over.'[54] Whether one bases such a claim in considerations of natural law or in the universality of human rights,[55] the inalienable or fundamental nature of the right being interpreted 'invites reference to comparative experiences to buttress or betray the universal appeal of the asserted right.'[56] By examining how other jurisdictions have interpreted a certain right, courts can inform their own interpretation of the right, as its (presumed) universal character means that all judges are linked in a common enterprise. Some commentators argue that this provides 'perhaps the most coherent theory to advance comparativist conceptions.'[57] For example, Paolo Carozza argues that a universal conception of human rights could provide the normative foundation for the use of foreign law in cases regarding the prohibition on cruel and unusual punishment:

> [T]he normative force of the transnational jurisprudence ... is premised upon the recognition of the common humanity of all persons. The universality of this sentiment, in principle, complements and supports the transnational character of the discourse in practice, and consistently provides a justification for courts to take foreign sources into account despite constraints of constitutional form, historical context, or political and social practice ... one of

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[54] Waldron, *"Partly Laws"*, 117. See also I. Cram, 'Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with Reference to Terrorism Cases' (2009) 68 CLJ 118; Bobek, *Comparative Reasoning*, 61.

[55] R. Posner, 'No Thanks, We Already Have Our Own Laws', (2004) Legal Affairs (July-August), <http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp> (stating that 'to cite foreign law as authority is to flirt with the discredited (I had thought) idea of a universal natural law').

[56] R.P. Alford, 'In Search of a Theory for Constitutional Comparativism', (2005) 52 UCLA LR 639, 659.

[57] Alford, 'In Search of a Theory for Constitutional Comparativism', 673.

> the strongest, most central foundations of the transnational jurisprudence of human rights in these cases is the recognition of our common humanity, our shared human nature.[58]

In support of this argument, one could cite the Privy Council case of *Reyes v The Queen*.[59] In that case, the applicant claimed that the mandatory death penalty of Belize breached the prohibition on 'inhuman or degrading punishment' contained in Section 7, Part II of the Constitution of Belize. Delivering the judgment of the Privy Council, Lord Bingham stated that

> Despite the semantic difference between the expressions "cruel and unusual treatment or punishment" (as in the Canadian Charter and the constitution of Trinidad and Tobago) and "cruel and unusual punishments" (as in the eighth amendment to the United States constitution) and "inhuman or degrading treatment or punishment" (as in the European Convention), *it seems clear that the essential thrust of these provisions, however expressed, is the same...*[60]

The shared 'essential thrust' of these provisions provided the basis from which Lord Bingham conducted a comparative survey into the treatment of the death penalty in various jurisdictions, all of which recognised the need to consider the imposition of the death penalty on a case-by-case basis.[61] The mandatory death penalty was therefore determined to have breached the Section 7 right of the Applicant. Indeed, the rhetoric of many more judgments seems to lend support to the idea that the judges are interpreting a transcendental legal concept.[62]

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[58] P.G. Carozza, "'My Friend is a Stranger": The Death Penalty and the Global *Ius Commune* of Human Rights' (2003) 81 Texas LR 1031, 1080.

[59] (2002) 2 AC 235 (P.C.). Roger Alford suggests that the reasoning in *Lawrence v Texas* is best viewed through the lens of natural law; Alford, 'In Search of a Theory for Constitutional Comparativism', 673. See also Posner, 'A Political Court', 86-87.

[60] *Reyes*, para 30 (emphasis added).

[61] In *Reyes,* The Privy Council made reference to the jurisprudence of the U.S., India, Canada, England & Wales, South Africa, the Inter-American Commission of Human Rights and the European Court of Human Rights; *Reyes,* paras 34-42.

[62] See for example, *Lawrence v Texas*, 577 and the cases cited in Carozza, "'My Friend is a Stranger'".

Elegant and compelling as this argument is, a few points of contention should be noted. First, the argument presumes the universality of human rights. Whilst this question will not be addressed in depth here, suffice to say that it is incumbent upon those who advance the argument from universalism to defend such a position and rebut the claim that human rights are culturally relative.[63] Similarly, the argument works on the assumption that the constitutional rights enshrined in the Eighth Amendment or the Human Rights Act 1998 are straightforward embodiments of those universal rights, and not more specific or detailed 'positivisations' of those right.[64] If the latter is true, then the argument for the use of foreign law based on universality seems to lose force.

Second, if successful, the argument from universality endows the judge with a great degree of latitude to determine which conception of the human right should be privileged.[65] This would, so the argument goes, obviate – or at least circumvent to a large extent – the democratic processes underlying the constitutional structure of the state. In essence, the recognition that a certain provision embodies a universal concept puts the power in the judges' hands, and not in those of the democratically elected representatives. Justice Black of the U.S. Supreme Court gave voice to such concern when he cautioned that '[s]uperimposing the natural justice concepts on the Constitution's specific prohibitions could operate as a drastic abridgement of democratic safeguards they embody.'[66] This is not to suggest that such judicial power is necessarily inappropriate, but simply to note that the argument from universality raises the spectre of judicial usurpation of power.

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[63] See for example, J. Donnelly, 'The Relative Universality of Human Rights', (2007) 29 Human Rights Quarterly 281, 293-98.
[64] Waldron, *"Partly Laws",* 120-23.
[65] Alford, 'In Search of a Theory for Constitutional Comparativism', 668.
[66] *Int'l Shoe Co. v Washington,* 326 U.S. 310, 325 (1945) (Black J., separate opinion).

Third, it does not follow from the concept of a universal right that states should necessarily follow a certain solution adopted by other states.[67] As Waldron notes 'universalism is not a consensus notion; it is an objective truth notion, and it says that the truth is the same everywhere, whatever people happen to believe.'[68] Why then does it make sense for a judge to examine the law of other countries to discern what this objective truth notion is? Looking to your neighbour makes no sense if they have got the answer wrong as well. Those that promote an argument from universalism for the use of foreign law must explain how reference to foreign law makes the realisation of the objective right more likely. Drawing on Condorcet's jury theorem,[69] it might be argued that the aggregation of the world's experience searching for a universal right makes reference to other legal systems valuable.[70] But history demonstrates that world consensus has sometimes been strikingly out of line with what we now consider to be protected by inalienable human rights; consider, for example, consensus within western European states regarding the acceptability of slavery in the seventeenth and eighteenth centuries.

Fourth, the argument from universality is limited to cases involving universal rights. As its very foundation is universality, the argument cannot carry over to other areas of the law in which courts might face cognate legal issues but which lack a universal normative foundation, such as, for example, tort law. Recent empirical studies have shed light on the extent to which courts' use of foreign law is limited to the interpretation of universal rights, the findings of which are studied in Section III. Although the rhetoric of some cases lends support to the argument from

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[67] Waldron, *"Partly Laws",* 117-20.

[68] Waldron, *"Partly Laws",* 117.

[69] Posner & Sunstein give the following explanation of Condorcet's jury theorem: 'suppose that people are answering the same question with two possible answers, one false and one true. Assume too that the probability that each voter will answer correctly exceeds 50%, and that thesse probabilities are independent. The Jury Theorem says that the probability of a correct answer, by a majority of the group, increases toward 100% as the size of the group increases. The key point is that groups will do better than individuals, and large groups better than small ones so long as two conditions are met: majority rule is used and each person is more likely than not to be correct'; E. Posner & C. Sunstein, 'The Law of Other States', (2006) 59 Stanford LR 131, 141.

[70] Posner & Sunstein, 'The Law of Other States', 142-43.

universality, it is rarely advocated in the literature, perhaps due to the contingent points that must be defended for it to be successful.

ii. The Learning Argument

The most prevalent normative argument for the use of foreign law in the interpretation is based on the idea that a judge might 'learn' something by looking to other jurisdictions.[71] In its most basic version, this argument simply posits that 'If I [as a judge] have a difficult case and ... a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something.'[72] Myriad different iterations of the learning argument have been advanced to promote the use of foreign law, of which three will be examined in this section: first, the 'standard' (or 'casual')[73] version of learning argument, whereby judges look abroad for inspiration of how to deal with a certain legal issue; second, the 'consequentialist' learning argument which suggests it might be beneficial for judges to look abroad for information regarding the consequences of adopting a particular legal solution; and, third, the 'engagement' version of the learning argument posits that the laws of other jurisdictions act as interlocutors for judges, enabling them – through a process of comparison and contrast – to come to a better understanding of their own law.[74]

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[71] For a similar argument in relation to diffusion of legislation, see K. Linos, *The Democratic Foundations of Policy Diffusion: How Health, Family, and Employment Laws Spread Across Countries* (OUP 2013) 18-34. On learning and policy adoption more generally, see C. Meseguer, 'Rational Learning and Bounded Learning in the Diffusion of Policy Innovations', (2006) 18 Rationality and Society 35.

[72] Justice Breyer in N. Dorsen, 'A Conservation between U.S. Supreme Courts Justices' (2005) 3 International Journal of Constitutional Law 519, 523.

[73] The 'casual' version of the learning argument is the term used by Waldron; Waldron, *"Partly Laws",* 82-85.

[74] Jackson, 'Constitutional Comparisons', 114.

The standard version of the learning argument is perhaps least problematic, and is the argument that is most frequently invoked by members of the judiciary to justify recourse to foreign law.[75] Regardless of the identity of its exponent, the main points of this argument remain constant: the court is faced with a problem that has been addressed by courts in other jurisdictions, so why should the court not look abroad for (non-binding) inspiration as to a solution? In the words of one judge, 'foreign opinions could function like superstar amicus briefs, offering otherwise unavailable viewpoints, delivered from unique perspectives, by some of the world's leading legal minds.'[76]

An illustrative example of this form of 'learning' is the reasoning of certain members of the House of Lords in the case of *Fairchild v Glenhaven Funeral Services*.[77] The applicants in that case were exposed to asbestos from various sources throughout their working lives, but could not determine which source caused them to contract mesothelioma. Due to this uncertainty, a strict application of the 'but for' test of causation would result in no respondent being held liable for the harm caused to the applicants by asbestos. Lord Bingham recognised that

> The problem of attributing legal responsibility where a victim has suffered a legal wrong but cannot show which of several possible candidates (all in breach of duty) is the culprit who has caused him harm is one that has vexed jurists in many parts of the world for many years ... It is indeed a universal problem calling for some consideration by the House, however superficially, of the response to it in other jurisdictions.[78]

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[75] See for example, R. Bader Ginsburg, 'Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication' (2003) 40 Idaho LR 1; the comments of Justice Breyer in N. Dorsen, 'A Conservation between U.S. Supreme Courts Justices'; Mak, *Judicial Decision Making*, 201-02.

[76] S.S. Abrahamson & M.J. Fischer, 'All the World's a Courtroom: Judging in the New Millennium', (1997) 26 Hofstra LR 273, 287.

[77] [2002] UKHL 22.

[78] *Fairchild*, para 23.

Similarly, Lord Roger noted that a variety of commonwealth and European cases dealing with analogous issues suggest 'that it is not necessarily the hallmark of a civilised and sophisticated legal system that it treats cases where strict proof of causation is impossible in exactly the same way as cases where such proof is possible.'[79] The consideration of the law of causation in a variety of foreign jurisdictions (amongst them Germany, Greece, Austria, the Netherlands, the U.S., Norway, Australia and Canada) led the Lord Bingham to the conclusion that

> Whether by treating an increase in risk as equivalent to a material contribution, or by putting a burden on the defendant, or by enlarging the ordinary approach to acting in concert, or on more general grounds influenced by policy considerations, most jurisdictions would, it seems, afford a remedy to the plaintiff ... [80]

Framed in terms of 'learning', the foreign laws cited by the House of Lords demonstrated that different approaches to causation were available and accepted by other jurisdictions to deal with cases of multiple sources of potential harm. This supported their Lordships' interpretation of the English authorities,[81] and resulted in the adoption of a 'material contribution' test of causation.

'Learning' from other jurisdictions must be viewed on a sliding scale. At one end, foreign law used as inspiration for a particular solution is not treated as authoritative or binding for the court that has recourse to it.[82] Instead, the weight that the foreign law is given depends on the persuasiveness of its reasoning, or the attractiveness of adopting the solution in the 'host' context based on a particular interpretation of the domestic laws. Indeed, if it is treated simply as

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[79] *Fairchild*, para 168.
[80] *Fairchild,* para 32 (per Lord Bingham).
[81] In particular, the decisions of the House of Lords in *McGhee v National Coal Board,* [1973] 1 WLR 1; and *Wilsher v Essex Area Health Authority*, [1988] AC 1074.
[82] Young, 'Foreign Law', 151-52. See also *Fairchild,* para 32 (per Lord Bingham) ('Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions.')

non-binding inspiration for the development of the host systems laws (as in *Fairchild*), it seems 'positively anti-intellectual and hubristic to say that we can learn nothing from foreign jurisdictions'.[83] The furore surrounding the use of foreign law seems not to stem from this uncontroversial version of the learning argument, but rather from the contention that courts actually give more authority to foreign law than using it as mere inspiration for a particular legal solution.[84] At the other end of the 'learning' spectrum, there is wholesale importation of foreign legal institutions into the host system, called 'legal transplants'. Legal transplants are of great interest for comparatists – particularly because of the methodological challenges faced by those attempting such transplants – but hold less interest for a study of judicial reasoning quite simply because such transplants are almost always carried out by legislative as opposed to judicial action.[85]

A similarly uncontentious but slightly different variant of the learning argument is the use of foreign law to 'cast an empirical light on the consequences of different solutions to a common legal problem."[86] Indeed, even the staunchest critics of the use of foreign law admit that such reference may justifiable. For example, Justice Scalia has acknowledged that

> Of course, you can cite foreign law to show ... that if the Court adopts this particular view of the Constitution, the sky will not fall. If we get much more latitudinarian about our approach to the Establishment Clause, for example, things won't be so bad, since France,

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[83] Young, 'Foreign Law', 151.
[84] Waldron, *"Partly Laws",* 85.
[85] See M. Siems, *Comparative Law* (CUP 2014) 191-221; for an interesting case study of the transplant of the English doctrine of undue influence, see M. Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding' (2013) 62 ICLQ 1.
[86] *Printz v U.S.,* 521 U.S. 898, 977 (1997) (Breyer J., dissenting).

> which is probably the strictest on separation of church and state in Europe, allows much more state assistance to religion. It's useful for that.[87]

An illustrative example of such use of foreign law is the U.S. Supreme Court case of *Washington v Glucksberg*, in which the Court was called upon to determine if a ban on assisted suicide was unconstitutional.[88] Chief Justice Rehnquist, delivering the opinion of the Court, accepted the State's fear that assisted suicide might lead down a slippery slope to involuntary euthanasia. Confirmation for this was found in empirical research related to the permissive approach taken to assisted suicide in the Netherlands.[89]

A third variety of the learning argument posits that foreign laws are used as a method of 'testing [an] understanding of one's own traditions and possibilities by examining them in reflection of others.'[90] Vicki Jackson notes that judges are prohibited from discussing pending cases because of concerns regarding neutrality and impartiality. Foreign decisions, she argues, might act as a 'partial intellectual substitute' for discussion with others regarding the issues in a case, providing judges with 'a testing from outside that may be particularly helpful on the most controversial and apparently value-laden choices.'[91] Jackson uses the reasoning of the U.S. Supreme Court in *Roper* as an illustrative example. The use of foreign laws by the majority in that case did not constitute unjustified deference to the will of 'like-minded foreigners',[92] but rather prompted deeper reflection on the part of the majority on whether the 'current interpretations live up to our own

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[87] Justice Scalia in N. Dorsen, 'A Conservation between U.S. Supreme Courts Justices', 526.
[88] 521 U.S. 702 (1997).
[89] Specifically, in 1990, there were more than 1000 cases of euthanasia without explicit request; *Washington v Glucksberg*, 734-35 (Rehnquist C.J., for the Court). See also the cases cited in Markesinis & Fedtke, *Judicial Recourse to Foreign Law,* 127-35.
[90] Jackson, 'Constitutional Comparisons', 114. See also, Bell, 'The Argumentative Status of Foreign Legal Arguments', 17.
[91] Jackson, 'Constitutional Comparisons', 119.
[92] *Roper*, 608 (Scalia J., dissenting).

constitutional commitments.'[93] There would seem to be nothing in principle against using foreign law as a 'sounding board' for it does not attribute authority to the foreign law *in se*.[94] Rather, the legal decision is made on the basis of the principles of domestic law alone, as understood and illuminated in contrast to the practices of other states.[95]

Similarly, Anne-Marie Slaughter argues that judges are united by a common identity that is 'forged more by their common function of resolving disputes under rules of law than by the differences in the law they apply and the parties before them.'[96] The commonality of procedural and substantive issues which creates this identity is strengthened by the increased physical and intellectual interaction in the form of judicial exchanges and symposia, and is underpinned by shared principles that define the mutual relations within the community (for example, a shared commitment to pluralism).[97] The practical consequence of membership in such a community is for Slaughter similar to the engagement theory of Jackson: the foreign authority is predominantly useful because 'it teaches them something they did not know or helps them see an issue in a different and more tractable light.'[98] Slaughter goes one step further, however, arguing that citation of foreign law could increase the legitimacy of the domestic judgment by demonstrating (or asserting) membership to a particular political, legal or cultural community.[99]

On the theoretical plane, the three iterations of the learning argument canvassed are more vulnerable to the methodological arguments against the use of foreign law than critiques based

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[93] Jackson, 'Constitutional Comparisons', 127.
[94] Sitaraman, 'The Use and Abuse of Foreign Law', 665.
[95] See also *Raines v Byrd,* 521 U.S. 811 (1997), 828 (Rehnquist C.J., for the Court); Bell, 'The Argumentative Status of Foreign Legal Arguments', 11.
[96] Slaughter, 'Global Community of Courts', 192. See also A.-M. Slaughter, *A New World Order* (Princeton UP 2004) 68.
[97] Slaughter, 'Global Community of Courts', 194, 217; Slaughter, *A New World Order*, 96-99, 103.
[98] Slaughter, 'Global Community of Courts', 201.
[99] Slaughter, 'Global Community of Courts', 201. See also, F. Schauer, 'The Politics and Incentives of Legal Transplantation', Center for International Development at Harvard University Working Paper No. 44 (2000), 17; Slaughter, *A New World Order*, 72-74.

on concerns regarding democracy. Their relative invulnerability to the latter stems from the fact that all versions of the learning argument conceive of foreign law as, at most, persuasive authority for the domestic court: the foreign law is not imported into the domestic system wholesale, nor is deference to its authority absolute. Instead, the learning argument works on the basis that the judges citing the foreign law are constrained by the domestic laws in their decision-making.

One potential downfall of the argument is that judges often seem to give more authority to the foreign law than simply using it as a device to learn from other systems. Ernest Young makes this point in relation to *Roper*, which he considers to be emblematic of the U.S. Supreme Court's use of foreign law:

> *Roper,* however, does not read like a case in which the Court looked abroad hoping to "learn something." The hallmark of persuasive authority is engagement with the *reasons* for a practice or a decision rather than the counting of noses ... But Justice Kennedy's discussion of foreign law is all about noses, not reasons ... So what did we "learn," exactly?[100]

Young's view of the learning argument is too restrictive. Indeed, courts might treat foreign law as persuasive authority, and in that sense 'learn' from the reasoning of a judgment. But also courts might use foreign law in a wider sense, for example to illustrate the different possibilities open to the court (as the House of Lords did in *Fairchild*), to use as a tool for self-reflection, or to provide support for a domestic legal principle that also finds expression in other members of the political, legal or cultural community of states to which it belongs. These can both be accommodated within the broad understanding of the learning argument formulated above, but would fall outside of Young's restrictive conception of 'learning'.

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[100] Young, 'Foreign Law', 152.

If we set the equation of the learning argument with persuasive authority aside, Young nevertheless voices legitimate concern. If the Supreme Court gave weight to foreign laws in judicial reasoning not because they shed light on a problem of domestic law, but rather that it 'treat[ed] the mere fact that foreign jurisdictions condemn the juvenile death penalty as a reason to condemn that practice in the United States', then questions of democratic legitimacy are raised. But then, of course, the Court would not really be learning. The real critique from the point of view of democracy is then not levelled against the learning argument itself, but rather that no such 'learning' occurs.[101]

The argument from accuracy seems to hold more weight with respect to the learning argument: if a judge does not understand the law that is drawn upon, or its place in the context of the larger legal system, then how can they 'learn' from it? The answer to this question depends on how exactly the foreign law is used. Take, for example, the arguments of Jackson and Slaughter based on the ability of foreign law to promote self-reflection about the domestic law being interpreted. Even an inaccurate understanding of the foreign law could promote beneficial reflection on the part of the interpreter.[102] As would be the case with an accurate interpretation of a foreign law, the onus is on the domestic judge to base their decision on the domestic law.

On the other hand, if the judge draws from a foreign legal system in one of the first two above-mentioned variants of the learning argument, the accuracy argument gains more currency. Let us take a hypothetical to illustrate this: a judge is faced with a claim for compensation due to the negligent exposure of the applicant to asbestos from a multitude of sources. The judge finds that the rules of causation in foreign jurisdictions have *not* been relaxed where harm could have

[101] See for example, Posner, 'Foreword: A Political Court', 84.
[102] Bobek, *Comparative Reasoning*, 246.

eventuated from multiple sources, and determines that, as other states have not found it necessary to relax the rules of causation, neither should his or her domestic system. However, the judge neglects to take account that in all other systems a centralised, no-fault system of compensation for victims of asbestos fulfils the same role that tort law otherwise would. As a result of the judge's inaccurate understanding of the foreign system, the applicant is left without recourse to compensation.[103]

As with the argument against based on democratic considerations, considerations of accuracy do not provide an *a priori* reason to reject the use of foreign law. If judges use the foreign law simply to inspire evolution of the domestic law or to use as an 'interlocutor' without giving the foreign law direct effect, then the arguments against the use of foreign law have no purchase. The arguments against from democracy and accuracy do, however, highlight the criticisms that will be levelled at uses of foreign law if it is used as something more than inspiration, empirical evidence or persuasive authority. Whether foreign laws are in fact used in this way will be examined in Section III of this chapter.

iii. Waldron's Ius Gentium

Jeremy Waldron's argument for the use of foreign law in domestic courts rests in between the argument from universality and the learning argument, providing one of the most interesting arguments for the use of foreign law. It provides a sophisticated (but perhaps rather rose-tinted) picture of judiciaries around the world as being united by a common method of dealing with problems in pursuance of a just solution. This unity of method and purpose, instead of the universality of the law being interpreted, provides the normative basis for the use of foreign laws.

[103] Cf. Posner, 'Foreword: A Political Court', 86.

Waldron's main thesis is that courts are in fact drawing upon a body of extant transnational legal principles, *ius gentium,* when they adduce foreign laws.[104] These principles are identifiable by a process of induction from the domestic laws of states around the world, and are understood to be a 'set of principles whose authority stemmed from the fact that they had established themselves as a normative consensus on the topics that they addressed among lawmakers, judges and jurists around the world'.[105] These principles, Waldron argues, form a non-binding source of law capable of being drawn upon by domestic courts.

In contrast to arguments based on learning, Waldron contends that the normative authority of *ius gentium* cannot solely be explained by the strength of the reasoning that a foreign law or judgment embodies. Lawyers, he argues, have a certain method of unpacking a problem, identifying the issues involved, and resolving opposed considerations with the goal of a just outcome. The invocation of *ius gentium* is not just the piecemeal exploration of prospective legal solutions, but rather the embodiment of the world's experience 'with the legal analysis of the problem - looking for forms of analysis that others have pioneered that open the prospect of our being able to identify and attend methodologically to the issues and values that matter in this issue'.[106] This accumulated experience, coupled with transnational commitments to justice and coincidence of legal method, explains the normativity of *ius gentium*.

Waldron also addresses the practical and principled arguments for the transnational harmonization of laws that *ius gentium* permits. The former are reasonably uncontentious: laws should be harmonized for reasons of predictability, stability and comity between countries. The argument from principle, on the other hand, is more complex. Although a domestic judiciary

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[104] This section draws on D. Peat, 'Review of Jeremy Waldron, *"Partly Laws Common to All Mankind": Foreign Law in American Courts*' (2014) 73 CLJ 641.
[105] Waldron, *"Partly Laws",* 47.
[106] Waldron, *"Partly Laws",* 102.

could be accused of injustice for treating identical cases in different ways, which body could we accuse of injustice if identical cases are decided differently in State A and State B?

According to Waldron, this is the wrong question to ask. Instead, we should focus on the *basis* of the individual's claim to equality of treatment on a transnational level. He argues that we have a shared sense of human rights that constitutes a single community, and we are cognizant of these shared rights. As a result, we have 'legitimate concern for harmonization – so that we will all be treated by the same standards'.[107] This 'principled association' creates both the community and the demand for equality on the transnational level. In the end, the practical and principled arguments for the use of foreign law are not dispositive of whether recourse should be had to foreign law. Rather they are arguments adduced by Waldron to try to explain why 'foreign law might have some weight with us, even over and above its immediate persuasiveness'.[108]

However, there are various points at which Waldron's line of argument raises questions. First, although it is consistently asserted that recourse to foreign law is best characterised as recourse to principles of *ius gentium,* it is not clear why this is the case. Waldron seems to think that solely considering the normative arguments for recourse to foreign law invites courts to take a piecemeal approach to their application, and that his theory of *ius gentium* circumvents such an approach. It is, however, not readily apparent why this might be. Could courts not just as easily selectively apply principles of *ius gentium*? Absent any obligation to apply such norms, the benefits of invoking a theory of *ius gentium* seem to be mere conjecture.

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[107] Waldron, *"Partly Laws",* 134.
[108] Waldron, *"Partly Laws",* 141.

Further, principles of *ius gentium* do give the practical and principled arguments something upon which to attach,[109] but that does not seem to be necessary in order to deploy such arguments. The arguments that Waldron describes are in themselves able to account for the elements of practice that he constructs the *ius gentium* theory to explain. Admittedly, the principled argument for harmonization requires the recognition of transnationally held values that found the basis of a community, but casting these values as an autonomous body of principles does not seem to be a necessary corollary.

Second, Waldron's focus is on the use of foreign authorities in U.S. constitutional adjudication. The potential applicability of his theory outside of this realm begs several questions. The principled argument for harmonization, for example, is premised on the basis that a community exists by virtue of identical (or very similar) conceptions of human rights. In other fields of law, what forms the basis of a similar community? Does this mean that a principled argument for harmonization is limited to a small number of universally held human rights? Or does Waldron's conception of a principled community allow for flexibility to extend the argument to, for example, areas of commercial law which seem ripe for the invocation of foreign law in legal reasoning? Indeed, Waldron himself notes the similarity between *lex mercatoria* and *ius gentium* but does not go on to apply his arguments to the former concept.[110]

Finally, the argument that Waldron deploys to explain the normative authority of *ius gentium* is based on the premise that all law works towards the same goal: a just solution. Waldron admits that this is not always the case, but if so why would consensus have authority over and above the persuasiveness of the legal reasoning it embodies? Is this normativity not contingent on the pursuit of a common goal via common methods? Once the unity of aim has disappeared, it is

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[109] Waldron, *"Partly Laws",* 9.
[110] Waldron, *"Partly Laws",* 45-46.

difficult to maintain that reference to foreign law has some kind of special normativity: the reasoning of a judiciary that aims at a just solution to a problem may differ to that of another which pursues 'a workable solution, or an efficient one'.[111] Absent commonality of goal, this argument seems to fall away.

III. The Practice of Domestic Courts

Whilst the debates surrounding the use of foreign law have been heated (and at some points rather vitriolic), several recent studies of the practice of domestic supreme courts have shone a new light on the normative claims made. This section draws on recent qualitative and quantitative empirical work to highlight which arguments find validation in the practice of the courts and what lessons might be learned from such studies.

i. Frequency of Recourse to Foreign Law

The first point of note is that all studies highlight the relative scarcity of recourse to foreign law by domestic courts. In their study on the non-mandatory use of foreign law by European supreme courts, Martin Gelter and Mathias Siems found 1,430 instances of foreign citation out of 636,172 decisions that were sampled.[112] Similarly, in his qualitative study of comparative reasoning, Michal Bobek notes that 'the current use of non-mandatory foreign authority in European supreme courts is minimal.'[113] This conclusion seems to hold true outside of the European setting as well. In their quantitative study of foreign citation in the U.S. Supreme

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[111] Waldron, *"Partly Laws",* 106.

[112] M. Gelter & M. Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts' (2012) 8 Utrecht LR 88, 89. Gelter & Siems' work surveys the practice of the courts of Austria, Belgium, England and Wales, France, Germany, Ireland, Italy, the Netherlands, Spain and Switzerland.

[113] Bobek, *Comparative Reasoning*, 282. Bobek surveys the practice of the courts of England and Wales, France, Spain, Germany, the Czech Republic and Slovakia.

Court, Ryan Black and his colleagues note that only 6.39% of the Court's published opinions contain reference to foreign law, and only 4.73% of those were positive references.[114]

ii. Which Foreign Law is Used?

A second point of interest is that the empirical data refutes the idea that courts 'cherry pick' the law that coheres with their policy objectives whilst ignoring other, contradictory foreign laws. In their study, Gelter and Siems carried out regression analysis of the cross-citations made by ten courts using variables that fell into four categories: the characteristics of the cited country (including population, GNP and corruption); common languages and language skills; legal origins and legal family; and cultural, political and geographic proximity to the citing state.[115] They found that courts did not opportunely pick and choose which foreign jurisdictions to refer to, but rather that the countries to which reference was made could be explained in reference to certain consistent criteria; namely, accessibility, authoritativeness, and similarity.

First, the accessibility of decisions of a foreign court played a large role, particularly in terms of the languages in which judgments are available and the linguistic competencies of judges.[116] For instance, the Irish Supreme Court cited the English Court of Appeal in 98% of its citations to foreign law, and the Austrian Oberster Gerichtshof cited the German Bundesgerichtshof in 94% of its foreign citations.[117] Second, countries are more likely to be cited because of a large population and a low level of corruption.[118] The import of the former results partly from the fact that courts of a large country are more likely to have addressed a particular issue before the

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[114] R.C. Black *et al,* 'Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court's Use of Transitional Law to Interpret Domestic Doctrine' (2014) 103 Georgetown LJ 1, 29.

[115] M. Gelter & M. Siems, 'Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe' (2013) 21 Supreme Court Economic Review 215, 245-47.

[116] Gelter & Siems, 'Language, Legal Origins, and Culture Before the Courts', 267. Cf. Linos, *The Democratic Foundations of Policy Diffusion*, 19-22.

[117] Gelter & Siems, 'Networks, Dialogue or One-Way Traffic?', 93.

[118] Cf. Linos, *The Democratic Foundations of Policy Diffusion*, 31.

courts of a smaller country face the issue,[119] whilst the latter is considered to be a reflection of the reputation of the country's legal system.[120] Third, similarities in legal traditions, cultural and political economic traditions also play a role in determining which foreign jurisdictions courts cite. The similarities between citing and cited country mean that 'the responses to the legal and policy issues addressed by a court in one country may provide a better fit in the other because the effects will be similar'.[121]

The conclusion that courts do not 'cherry pick' decisions is bolstered by the analysis of the fields of law in which foreign law is cited. Gelter and Siems found that the courts included in their survey do not randomly draw on foreign laws, but select those that are similar in specific fields. Take the Austrian Oberster Gerichtshof as an example. More than half of this court's 502 citations to foreign courts were in the field of commercial law, and these were overwhelmingly citations to German law. The commercial law in Germany and Austria was substantially similar for most of the twentieth century, with the German Commercial Code and related statutes being introduced into the Austrian legal system in 1938.[122] The authors note that the largest number of cases in which foreign law is used concern the Austrian Insurance Contract Act (*Versicherungsvertrag*), which was 'for a long time almost identical' to the German Insurance Contract Act.[123] This pattern is seen across the jurisdictions surveyed in their analysis and the conclusion is corroborated by other empirical studies.[124]

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[119] Gelter & Siems note that states with a higher population are also cited more frequently because 'sheer numbers inherently make the jurisdiction more important'; Gelter & Siems, 'Citations to Foreign Courts', 58.

[120] Gelter & Siems, 'Language, Legal Origins, and Culture Before the Courts', 247, 267. Interestingly, the authors found that a population increase of one million inhabitants increases the number of citations of that jurisdiction by 3.82%; *ibid*, 260.

[121] Gelter & Siems, 'Citations to Foreign Courts', 58. Cf. Linos, *The Democratic Foundations of Policy Diffusion*, 31.

[122] Gelter & Siems, 'Citations to Foreign Courts', 63.

[123] Gelter & Siems, 'Citations to Foreign Courts', 63.

[124] On the basis of interviews with supreme court judges, Elaine Mak reaches similar conclusions, finding that selection of the foreign law cited depends predominantly on three factors: tradition, language and prestige; Mak, *Judicial Decision-Making*, 206. See also Black *et al*, 'Upending a Global Debate', 39-40; Bobek, *Comparative Reasoning*, 197; Flanagan & Ahern, 'Judicial Decision-Making and Transnational Law', 21; B. Roy, 'An Empirical Survey of

Whilst the jurisdictions cited may be relatively consistent, there is another form of cherry picking – a kind of 'meta-cherry picking'[125] – whereby judges selectively pick and choose the cases in which they will refer to foreign law.[126] The empirical research suggests that judges only have recourse to foreign law when it reinforces their argument.[127] This supports John Bell's contention that 'the argument from a foreign legal system typically adds lustre to an argument already available in the host legal system, it is a further thread to support an argument which already has support within the national sources of law.'[128] The place of foreign law as an argument that is subsidiary to arguments based on intra-systemic sources is a trait found in every court surveyed.

Despite being adduced in a self-serving way, the citation of foreign law is not divided along ideological lines, as U.S. conservatives contend. Black and his colleagues demonstrated that liberal and conservative judges cite foreign law just as frequently as each other when it supports their argument. In the words of the authors, both camps are 'ideologically motivated, strategic judicial actors who seek support for their ideological positions.'[129]

Furthermore, there is little support for the proposition that judges consider themselves to be members of an emergent 'global community of courts' within which cross-citation is rife, as suggested by Anne-Marie Slaughter. Bobek notes that there is no basis in courts' judgments to

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Foreign Jurisprudence and International Instruments in *Charter* Litigation' (2004) 62 University of Toronto Faculty Law Review 99, 129.

125 Waldron, *"Partly Laws",* 176.

126 *Roper*, 624 (Scalia J., dissenting).

127 Black *et al*, 'Upending a Global Debate', 43; Flanagan & Ahern, 'Judicial Decision-Making and Transnational Law', 23-24. Cf. Comments of G. Kodek of the Austrian Supreme Court in Gelter & Siems, 'Citations to Foreign Courts', 64.

128 Bell, 'The Argumentative Status of Foreign Legal Arguments', 11. See also Bobek, *Comparative Reasoning*, 216-17.

129 Black *et al*, 'Upending a Global Debate', 44.

conclude that such a global community is in its formative stages; indeed, to the contrary, 'judicial comparisons are deeply regional and the authority chosen very selective.'[130] Similarly, Gelter and Siems' work highlights that it is not the lack of 'common values and principles' that stymies the emergence of a global community of courts, but rather more basic considerations such as citation style and language which dictate judicial citation of foreign law.[131]

Whilst there seems to be no evidence of a 'global community of courts' in judgments, there is some evidence for the claim that judges might consider themselves to form a 'professional reference group' to which adherence is rewarded with approval or acceptance.[132] Brian Flanagan and Sinead Ahern's study of common law judges provides the best illustration of this. In response to a question regarding which speech they would rather attend at a conference, 68% of respondents[133] said they would prefer to go to a speech by a foreign supreme court judge than attend a speech by one of their colleagues or a member of a subordinate domestic court.[134] Although this finding is notable, the conclusions that one can draw from it are limited. The scope of the study, which is limited to common law judges, means that the existence of a 'professional reference group' on the global plane is yet to be proven.[135] Moreover, the study acknowledges that self-identification with a professional reference group of judges does not necessarily equate to the increased use of foreign law in judgments.[136]

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[130] Bobek, *Comparative Reasoning*, 197. Bobek castigates Slaughter's theory for 'simply putting the cart before the horse (and then disapprovingly castigating the horse for not pushing, without explaining why pulling is no longer good enough)'; *ibid*, 240.

[131] Gelter & Siems, 'Citations to Foreign Courts', 85.

[132] Flanagan & Ahern, 'Judicial Decision-Making and Transnational Law', 13.

[133] The 43 respondents were members of the British House of Lords, the Caribbean Court of Justice, the High Court of Australia, the Constitutional Court of South Africa, and the Supreme Courts of Ireland, India, Israel, Canada, New Zealand and the U.S.; Flanagan & Ahern, 'Judicial Decision-Making and Transnational Law', 9-10.

[134] Flanagan & Ahern, 'Judicial Decision-Making and Transnational Law', 19.

[135] Cf. E. Örücü, 'The Courts and the Legislator' in E. Örücü & D. Nelken, *Comparative Law: A Handbook* (Hart 2007) 415 (recognising the 'consciousness that common law is a whole').

[136] Flanagan & Ahern, 'Judicial Decision-Making and Transnational Law', 19.

Ultimately, the choice of which foreign law to refer to is consistent and predictable, rebutting claims of cherry picking but also casting doubt on the emergence of a global community of courts.

iii. How is Foreign Law Used?

Foreign law is used in three different ways by domestic courts.[137] First, courts simply look to the result of the foreign law; in other words, courts look at what the law does but not the reasoning behind the law.[138] Such reasoning occurs frequently in 'highly politicised cases and where the result is important for ideological reasons. In cases of this type, the legal reasoning is likely to be less interesting than the outcome of the case.'[139] The result of the judgment is interesting primarily because it demonstrates that another jurisdiction has found a particular approach to be acceptable, even in light of countervailing considerations. Second, judges follow the approach of other courts if their reasoning is persuasive.[140] This seems to confirm claims that espouse a certain form of the 'learning argument', examined above in Section II. As previously noted, the deference of a court to the reasoning of foreign courts may vary, and extremely deferential approaches that do not account for the particularities of the domestic system may be cause for concern. However, nothing in principle precludes reference to the reasoning of a foreign court if the decision is made on the basis of national law. Third, courts have used foreign law in a 'purely ornamental' fashion, providing the reader with an exhortation to "see also, law X of jurisdiction Y" in a similar vein to an academic paper. The purpose of such seemingly superfluous citation is

[137] This taxonomy is from Gelter & Siems, 'Citations to Foreign Courts', 70 *et seq.*
[138] See for example, *Roper,* 578 (Kennedy J., for the Court).
[139] Gelter & Siems, 'Citations to Foreign Courts', 71.
[140] Gelter & Siems, 'Citations to Foreign Courts', 74-79.

to 'strengthen the authority of the court in the legal community by showing how well the opinion is researched, and thus to guard the court against criticism.'[141]

Whilst finding evidence of the aforementioned uses of foreign law, the empirical studies conducted are equivocal regarding the theory that the universal character of fundamental rights justifies recourse to foreign law. For example, one study concludes that the comparative reasoning in judgments is 'not about objectivity or truth. It is about finding inspiration for devising new approaches and new solutions or about justification of a solution already reached, be it under the inspiration of comparative influence or without. The process is utilitarian and pragmatic'.[142] On the other hand, Flanagan and Ahern's study of common law judges found that 42% of respondents were 'frequent users' of foreign law when interpreting 'human and/or civil rights'.[143] Similarly, the study conducted by Mak suggests that judges from Canada and France place emphasis on the universal character of constitutional rights as a justification for recourse to foreign law.[144] Whilst it seems that the universality argument finds some limited support in the reasoning of courts, it is clear that such justification is not the preponderant – or even a very frequent – justification for the use of foreign law by courts.

iv. When is Foreign Law Used?

The studies also highlight certain characteristics that make a jurisdiction more likely to cite the law of a foreign state. First, judiciaries with an open, discursive style of legal reasoning are more likely to make reference to foreign law than those that follow a closed, syllogistic form of

[141] Gelter & Siems, 'Citations to Foreign Courts', 82.
[142] Bobek, *Comparative Reasoning*, 283.
[143] Flanagan & Ahern, 'Judicial Decision-Making and Transnational Law', 14.
[144] Mak, *Judicial Decision-Making,* 151-54, 159.

reasoning.[145] These forms of reasoning are traditionally associated with legal reasoning in common and civilian systems, respectively, and are directly linked to how openly courts may admit the influence of non-statutory or precedential materials.[146]

At the 'discursive' end of the scale, English courts readily admit the import of policy arguments in their judgments. In *Fairchild v Glenhaven*, for example, Lord Bingham acknowledged that 'The present appeals raise an obvious and inescapable clash of policy considerations.'[147] The discursive nature of the English judiciary's reasoning more readily permits consideration of extra-systemic sources in judgments.[148] At the other end of the spectrum, the French courts rarely step outside the strictures of their judgments' syllogistic structures. The differences in the style of reasoning characteristic of each legal system are a function of the history of the legal system and the constitutional framework within which it operates. Bobek explains this as follows:

> [the] definition of permissible sources of law is an exercise in political power displayed by the legislature or the constitution-maker vis-à-vis the judiciary. Amongst the very first things any new regime is likely to do is to define the applicable law and its permissible sources. In this way, Continental national legislatures in the late-18th and early 19th century proclaimed their own exclusivity with varying degrees of intolerance to anything else: revolutionary France being the strongest example...[149]

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[145] Bobek, *Comparative Reasoning,* 224. Bobek notes that the absence of reference to foreign law in judgments cannot lead one to the conclusion that courts do not have recourse to comparative law in discussions regarding the case; *ibid*, 226.

[146] Bobek, *Comparative Reasoning,* 198.

[147] *Fairchild*, para 33.

[148] Notably, see Roberts C.J. in *Sprint Communications Co. v APCC Services,* 554 U.S. 269 (2008) (citing Bob Dylan). See also, A.B. Long, 'The Freewheelin' Judiciary: A Bob Dylan Anthology' (2010) 38 Fordham Urban LJ 1363.

[149] Bobek, *Comparative Reasoning,* 198.

The ability for the judiciary to have recourse to extra-statutory or precedential material is related to Mak's concept of 'constitutional (in)flexibility'.[150] This concept reflects the ability of a constitutional system – or, indeed, of a legal system more generally – to adapt to novel normative changes that occur in society, whether of a social, moral, or political character. The less flexible a system is, the greater the need for judicial creativity in adapting the legal provisions to meet the needs of contemporary society, which includes extra-systemic reference to sources such as foreign law.

Another related characteristic that has influenced courts' propensity to use foreign law is the maturity of the citing legal system.[151] The Czech and Slovakian courts can be seen as illustrative examples of this.[152] These jurisdictions transitioned from communist states to liberal democratic polities in early 1993. Whilst the governmental institutions in both countries experienced a transformation in response to the changing will of the population, the judiciaries were left without law or scholarship that embodied the new values of society.[153] As a result, the courts were required to draw on extra-systemic sources – including foreign law[154] – as 'the reliance on such authority, which has the aureole of being a successful liberal model, is thus used, in practical terms, as the temporal replacement for lacking national law and case law, which would be in line with the values of the new political system.'[155]

This neatly leads us to the final lesson that can be drawn from the studies of comparative reasoning in domestic courts, namely, the purposes for which courts have had recourse to

[150] See in particular, Mak, *Judicial Decision-Making*, 18-35.
[151] Cf. Linos, *The Democratic Foundations of Policy Diffusion*, 34.
[152] Bobek, *Comparative Reasoning*, 255. Bobek contends that this analysis also extends to the Polish and Hungarian courts; *ibid*, 256.
[153] Bobek, *Comparative Reasoning*, 263-64.
[154] In particular, the Czech and Slovak courts have drawn on the law of Germany; Bobek, *Comparative Reasoning*, 255.
[155] Bobek, *Comparative Reasoning*, 264.

foreign law. All the empirical studies surveyed support the proposition that foreign law is used in particularly ideologically motivated or politically contentious cases.[156] Whilst the question of which cases fit within this definition is rather ambiguous, it seems that courts have had recourse to foreign law when acting a '*de facto* legislators' (that is to say, when faced with a gap in the law[157] and when giving effect societal change in law),[158] when conducting judicial review of acts of other branches of government, and when overruling precedent.[159] The use of foreign law in these instances can be explained by the same rationale: when pushed to the outer limits of the judicial function, courts have recourse to foreign law 'to create the illusion that it is acting with considerable supporting precedent.'[160]

As a descriptive matter, it might be accepted that foreign law is used to support arguments in politically or ideologically-charged cases, but quite why foreign law might give a court's decision more authority or acceptability is another question.[161] It was an attempt to provide an explanation as to *why* foreign laws might hold 'justificatory weight' that prompted Jeremy Waldron to create his theory of *ius gentium.* As noted above, there are several flaws in Waldron's argument, especially if one tries to extend the theory beyond the scope of fundamental or constitutional rights. In Chapter 3, the normative power of extra-systemic law is explained in reference to legitimacy. Not only does this explain the justificatory force of extra-systemic law, but it also provides us with a framework within which to assess international courts and tribunals' use of domestic law.

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[156] Black *et al*, 'Upending a Global Debate', 35-38, 43; Mak, *Judicial Decision-Making*, 201; Gelter & Siems, 'Language, Legal Origins, and Culture before the Courts', 244; Bobek, *Comparative Reasoning,* 206-11, 245; K. Henrard & E. Mak, 'The Use of Consensus Arguments in Transnational Decision-Making: Confirming or Jeopardizing Human Rights' available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2444682>, 22-23.

[157] Bobek, *Comparative Reasoning*, 206-07.

[158] Bobek, *Comparative Reasoning*, 208.

[159] Black *et al*, 'Upending a Global Debate', 35.

[160] Black *et al*, 'Upending a Global Debate', 43.

[161] Cf. Bell, 'The Argumentative Status of Foreign Legal Arguments', 13.

CONCLUSION: HYPOTHESES FOR THE USE OF EXTRA-SYSTEMIC LAW

The examination of the practice of domestic courts conducted in this chapter has proved instructive in several ways. First, it allowed us to survey the normative arguments for and against the use of extra-systemic law. Whilst the arguments against raised justifiable concerns from the point of view of liberal democracy and methodology, they did not convincingly refute the potential utility of recourse to foreign law. Second, the empirical work allowed us to see which arguments were undermined by the practice of courts (such as the 'cherry picking' critique) and which arguments found support in practice (such as the 'learning' argument). Finally, the empirical work also allowed us to identify several characteristics of the use of foreign law by domestic courts; namely, which foreign law is used, how is it used, and in which circumstances courts have had recourse to such law.

As noted in the introduction, domestic courts' use of foreign law and international courts' use of domestic law are analogous methods of legal reasoning in that they are both non-mandatory references to extra-systemic sources of law. How might we use the lessons learned in this chapter to inform the study of international tribunals' practice undertaken in this thesis? From the examination conducted in this chapter, we can draw three hypotheses for the use of domestic law in international courts and tribunals. Note, however, that these are hypotheses related to when domestic law is used, not the desirability of such use, which will be addressed in the Chapter 3. These hypotheses do not aim to cover the totality of the conclusions drawn by the empirical studies surveyed in this chapter, but instead constitute some 'common ground' of the findings.

The utility of formulating hypotheses is two-fold. First, testing these hypotheses will allow us to see in what respects the use of extra-systemic law in domestic and international tribunals is similar and where the use of domestic law on the international level might have particularly distinctive characteristics. Second, the hypotheses focus the attention of this thesis on three central aspects of the use of extra-systemic law: which law is being interpreted, the characteristics of the jurisdiction drawing upon the law, and how the law is deployed in the reasoning of the court.

Hypothesis 1 - The Character of the Law

First, the character of the rule being interpreted by the court matters with regard to the use of foreign law. Although the argument from universality found only limited support in the empirical studies, it was nevertheless identified as a factor in using foreign law. Similarly, the shared origins of a rule – such as the German and Austrian Insurance Contract Acts – provides a basis for courts to look to other jurisdictions interpretation of the analogous law. As a first hypothesis, let us take the following statement: domestic law is more likely to be used if the international rule that is being interpreted is of a universal character (such as human rights), or if it has its origins in another legal system (such as the transplant of the German Contract Insurance Act into Austrian law).

Hypothesis 2 - The Characteristics of the Jurisdiction

Second, as shown above, courts within certain legal systems are more likely to have recourse to foreign law than others. Amongst the characteristics identified as pertinent were the flexibility of the law to adapt to societal change, the coherence of the legal system with the political values of society, as well as whether the court is facing novel issues that have not previously been addressed by the legislature or prior domestic judicial decisions. These are systemic deficiencies in the domestic legal system for which foreign laws are adduced to help remedy. Similar

scenarios could occur on the international plane. A second hypothesis is therefore the following: systems in which there is scant law or precedent, or in which the law is at odds with the perceived values of the community, are likely to have recourse to domestic law to remedy such deficiency or discrepancy. In this case, judges are acting as '*de facto* legislators.'[162]

Hypothesis 3 - Extra-Systemic Law as an Auxiliary Argument

The practice of domestic courts demonstrates that the use of foreign law is an auxiliary argument that is proffered in addition to an argument already available within the domestic legal system. It is used to support a conclusion reached by other, intra-systemic means. Our third hypothesis reflects this: the use of domestic law by international courts and tribunals is always in support of an argument based on sources from within the system.

These hypotheses will be revisited in the Conclusion after the use of domestic law by international courts and tribunals has been studied in depth in Part II of this thesis. Whilst these serve as a framework within which to think about how international courts and tribunals might use domestic law as a matter of practice, the following two chapters ask the fundamental question of whether it is permissible to have recourse to domestic law, and – if so – under what circumstances.

[162] Bobek, *Comparative Reasoning*, 211.

2.

THE VIENNA CONVENTION AS AN EVALUATIVE FRAMEWORK

INTRODUCTION

In Part II of this thesis, it will be shown that international courts and tribunals have had recourse to domestic law when interpreting international law. However, how should we determine if and when recourse to domestic law is permissible? The answer, it might be thought, is straightforward. On the international level, there exist clear rules to guide and constrain the interpreter, acting as a veritable blueprint for their interpretive endeavours.[1] These rules, contained within Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT),[2]

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[1] The idea that legal rules provide the framework within which to evaluate conduct has been termed the 'evaluative' dimension of law by Gerald Postema; G. Postema, 'Positivism and the Separation of Realists from their Scepticism' in P. Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart 2010) 271-72. See also, G. Postema, 'Conformity, Custom and Congruence' in M. Kramer (ed), *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (OUP 2008) 55; A. Marmor, *The Philosophy of Law* (Princeton UP 2011) 2.

[2] Articles 31-32 VCLT provide that:

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

have been viewed as a 'self-contained, complete analytical frame that has attempted to systematise and to structure the various possible methods for discerning the meaning of a legal text',[3] the application of which has been described as 'virtually axiomatic'.[4] Indeed, such is the faith placed in the provisions of the VCLT that one commentator has stated that 'the text of the Vienna Convention, the process of its drafting, and the practice of its application are all unanimous in affirming that the rules on treaty interpretation are fixed rules and do not permit the interpreter a free choice among interpretive methods'.[5] According to this view, an interpretation is correct if it conforms to the provisions of the VCLT.[6] If we want to know whether it is permissible to use domestic law in the interpretation of international law, surely all we need to do is look at Articles 31-33 of the VCLT?

The reality is more complex. The faith placed in the provisions of the VCLT is – even if not wholly misdirected – at least somewhat overoptimistic. The purpose of this chapter is to demonstrate that the VCLT is not the benchmark against which to test the permissibility of a specific interpretive methodology. In order to make this claim, three strands of argument are developed.

(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

The genesis of these articles has been addressed at length elsewhere; see for example, R. Gardiner, *Treaty Interpretation* (OUP 2008) 51-73. Article 33 VCLT deals with the interpretation of plurilingual treaties, and will not be addressed in this chapter.

[3] G. Hernández, 'Interpretation' in J. Kammerhofer & J. d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 317, 326.

[4] Gardiner, *Treaty Interpretation,* 15. For recognition that Articles 31 to 33 of the VCLT reflect customary international law, see for example, *Avena and Mexican Nationals (Mexico v U.S.)* (2004) ICJ Rep. 37-38, para 83; WTO Appellate Body Report, *Japan-Taxes on Alcoholic Beverages* WT/DS/8, 10 & 11/AB/R (4 October 1996) 10; ECtHR, *Golder v U.K.,* 21 February 1975, no. 4451/70, para 32.

[5] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 309.

[6] For an overview of the VCLT generally, see for example, O. Corten & P. Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP 2011); M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009); O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012). For more theoretical approaches, see I. Venzke, *How Interpretation Makes International Law* (OUP 2012); A. Bianchi, 'Textual interpretation and (international) law reading: the myth of (in)determinacy and the genealogy of meaning' in P. Bekker *et al* (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (CUP 2010).

First, the VCLT articles do not privilege one method of interpretation over another. Instead, the provisions leave – and were intended to leave – a great deal of latitude to the interpreter to determine the appropriate interpretation of a provision in light of the prevailing circumstances and context. As a result, a range of interpretive approaches are justifiable under Articles 31-33, from teleological interpretation to literal interpretation and back to intentionalism. Using the VCLT as the framework within which to assess interpretation would hence be unhelpful. Instead, in order to assess the use of domestic law by international courts and tribunals, an evaluative framework that permits consideration of the context in which the interpretation is advanced is necessary.

Second, customary rules of interpretation may – and, indeed, have been acknowledged to – exist alongside Articles 31 and 32. A blinkered focus on provisions of the VCLT as a framework for determining the permissibility of an interpretation obscures the mutable nature of the rules of interpretation. Even within the confines of positive law, sole reference to the VCLT would be under-inclusive.

Finally, a more ambitious critique questions the very ability of rules to bind interpreters. The rules of interpretation cannot be followed without interpreting the provisions themselves, which must be done by reference to considerations extrinsic to the rules. The 'ordinary meaning' of 'ordinary meaning' in Article 31(1), for example, cannot be determined by reference to the provisions of the Vienna Convention. Instead, the interpreter must look elsewhere, relying on his or her value judgments as to what the term means. As the rules of interpretation do not provide

a restraint on interpretation,[7] they cannot serve as a benchmark against which to measure the permissibility of a specific interpretation.

This chapter is comprised of four sections. The first section of this chapter describes the work of the *Institut de Droit International* and International Law Commission related to treaty interpretation, which form the basis of Vienna Convention provisions. The following three sections elaborate the critiques outlined above, demonstrating why Articles 31 and 32 are insufficient to determine whether a particular interpretation is permissible or impermissible. The permissibility of the use of domestic law must be assessed against a different normative framework, such as one based on considerations of legitimacy. Such a framework will be elaborated in the following chapter.

I. The Evolution of the Rules of Interpretation

The codification or elucidation of principles or rules of interpretation is a matter that has taxed the minds of international lawyers for centuries. From Grotius to Pufendorf,[8] Vattel to Ehrlich,[9] jurists have attempted to rationalise and clarify the accepted methods of interpretation with varying degrees of success. It was not until the twentieth century, however, that impetus for the

[7] This is to be contrasted to the approach of many authors, including Alexander Orakhelashvili; Orakhelashvili, *The Interpretation of Acts and Rules*, 309. Whether Articles 31-33 should be referred to as 'rules' is highly questionable – the term is used here because it is commonplace in the literature, although as Isabelle Van Damme notes, 'the qualification of Articles 31 to 33 VCLT as binding 'rules' does not seem satisfactory for norms that govern interpretation ... the 'rules' of treaty interpretation may better be described as principles.'; I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 35.

[8] Grotius, *De iure Belli ac Pacis Libri Tres* (trans A.C. Campbell, Batoche 2001) chp 16; Pufendorf, *Of the Law of Nature and Nations,* Book V (trans B. Kennett, 1719) chp XII. On the development of canons of treaty interpretation in classical antiquity, see D.J. Bederman, *Classical Canons: Rhetoric, Classicism and Treaty Interpretation* (Ashgate 2001), chps. 3, 4, & 5.

[9] Vattel, *The Law of Nations*, Book II, chp XVII (trans anon, Liberty Fund 2008); L. Ehrlich, 'L'interprétation des Traités' (1928) 24 *Recueil des cours* 5.

codification of interpretive principles within modern treaty law took shape in the form of the Harvard Draft Convention on the Law of Treaties, published in 1935.[10]

The Harvard Draft, which – like its successors – relied heavily on arbitral practice and the case law of the nascent Permanent Court of International Justice,[11] adopted an 'extreme teleological or purposive approach' to interpretation,[12] stating that 'A Treaty is to be interpreted in light of the general purpose which it is intended to serve.'[13] Although reflecting the sentiment that the intention of the parties underpinned interpretation, such an approach was not followed in the subsequent codification attempts carried out in the mid-twentieth century under the auspices of the *Institut de Droit International* and the International Law Commission.

The work of the *Institut* commenced in 1950 under the guidance of Hersch Lauterpacht as Special Rapporteur. Lauterpacht's approach differed from that of the Harvard Draft Convention in one important way: he gave primacy to the intention of the parties, and not to the purpose that those parties intended the treaty to serve. In his view, this principle followed from the very purpose of interpretation: 'l'intention des parties doit être le facteur fondamental en matière d'interprétation des traités...'[14] It was in taking this stance that he faced staunch criticism from those who subscribed to the textualist school of interpretation. They adopted the view that, although it was the task of the interpreter to give effect to the intentions of the parties, it was the intention as manifested in the text of the treaty that should be the object of interpretation. A corollary of the intentionalist position adopted by Lauterpacht was that recourse to the

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[10] Harvard Draft Convention on the Law of Treaties, (1935) 29 AJIL Supp 653.

[11] The Harvard Draft Convention drew in particular on the works of Y.-T. Chang, *The Interpretation of Treaties by Judicial Tribunals* (Columbia UP 1933) and M.O. Hudson, *The Permanent Court of International Justice* (Macmillan 1934).

[12] Gardiner, *Treaty Interpretation*, 58.

[13] Article 19(a), Harvard Draft Convention, 661.

[14] H. Lauterpacht, 'L'interprétation des traites', (1950) 43(1) *Annuaire de l'Institut de Droit International* 367, 423 ('the intention of the parties must be the fundamental factor in treaty interpretation…'). Although cf H. Lauterpacht, 'Some Observations on Preparatory Work in Treaty Interpretation', (1935) 48 Harvard LR 549, 573.

preparatory work of a treaty should be permissible – indeed, encouraged – if it was of assistance in discerning the intention of the parties:

> [S]i l'interprète a pour tache de rechercher l'intention des parties, comment pourrait-il mieux arriver au but, en cas de litige, qu'en étudiant les procès-verbaux et les documents relatifs aux négociations, les instructions transmises aux délégués, les comptes rendues des discussions, les états successifs du projet, les déclarations prononcées d'un commun accord, les rapports autorises, bref tous les documents qui ont précédés la conclusion du traité ?[15]

Lauterpacht's intentionalism did not win the day in the *Institut*. Upon his election to the International Court, Gerald Fitzmaurice took the helm of the project, navigating it away from intentionalism into the supposedly serene waters of textualism, in which interpretation arguably remains until this day.

Following the line he adopted in two influential pieces written for the *British Yearbook of International Law*,[16] Fitzmaurice was of the view that 'c'est à l'intention exprimée dans ce *texte* et non pas à l'intention ou aux intentions antérieures qu'il faut se rapporter.'[17] He joined others in the *Institut* that voiced concern regarding the intentionalist approach to interpretation expounded

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[15] Lauterpacht, 'L'interprétation des traites', 392 ('If the task of the interpreter is to find the intention of the parties, how better could he achieve this goal than by studying the transcripts and documents related to the negotiations, the instructions transmitted to delegates, the minutes of the discussions, the successive drafts of the project, declarations made of a common understanding, authorised reports ; in brief, all the documents that precede the conclusion of the treaty ?').

[16] Sir G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–54: Treaty Interpretation and Other Treaty Points' (1957) 33 BYBIL 203; G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 BYBIL 1. In the 1957 article, the major principles identified were the Principle of Actuality, whereby 'Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts'; the Principle of the Natural and Ordinary Meaning; and the Principle of Integration, emphasizing context; effectiveness; subsequent practice; and the Principle of Contemporaneity (the only new addition when compared with the 1951 article); Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–54', 211-12.

[17] G. Fitzmaurice, 'Délibérations : Interprétation des Traites' (1952) 44(2) *Annuaire de l'Institut de Droit International* 372 ('it's the intention expressed in the *text* and not the prior intention or intentions [of the parties] that we should be interested in.')

by Lauterpacht. The main issue was that an intentionalist approach opened the door to the consultation of sources extrinsic to the treaty, providing every interpreter with a '*tabula in naufragio'*.[18] In addition to providing interpreters with a blank slate upon which they could construct any argument, textualists also doubted that preparatory works could actually fulfil the function that they proclaim to serve: contradictions and silences in the *travaux* were thought to be rife, and recourse would be 'tout à fait inutiles et même illusoires pour l'interprétation du traité'.[19]

As a result of the prevalence of the textualist view within the *Institut*, the following text was adopted at the 1956 Granada Session, enshrining the primacy of the text as the object of interpretation:

> Article premier
>
> 1) L'accord des parties s'étant réalisé sur le texte du traité, il y a lieu de prendre le sens naturel et ordinaire des termes de ce texte comme base d'interprétation. Les termes des dispositions du traité doivent être interprétés dans le contexte entier, selon la bonne foi et à la lumière des principes du droit international …[20]

The third body to tackle the codification of principles of treaty interpretation was the International Law Commission in the context of its work on the law of treaties, in which

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[18] Comments of Sir Eric Beckett, 'De l'Interprétation des Traites' (1950) 43(1) *Annuaire de l'Institut de Droit International* 440-44.

[19] Fitzmaurice, 'Délibérations : Interprétation des Traites' (1952) 44(2) *Annuaire de l'Institut de Droit International* 373 ('useless and even deceptive for the interpretation of the treaty').

[20] 'De l'interprétation des traités' (1956) 46 *Annuaire de l'Institut de Droit International* 349 ('First Article, 1) The agreement of the parties having been embodied in the text of the treaty, it is appropriate to take the natural and ordinary sense of the terms of the text as the basis of interpretation. The terms of the treaty should be interpreted in their context, in good faith and in light of the principles of international law…')

Fitzmaurice's work again played an outsize role.[21] Although Fitzmaurice was himself the third Special Rapporteur on the topic, it was not until Humphrey Waldock took his place as the fourth and final Rapporteur on the Law of Treaties that the Commission moved to consider the question of treaty interpretation, commencing in 1964. At first, the topic was treated with a healthy dose of scepticism and caution, with members of the Commission expressing doubt as to whether principles of interpretation could usefully be codified.[22] This reticence stemmed from the purportedly non-legal character of the maxims and principles of interpretation that found expression in the jurisprudence of international tribunals, the application of which to a large extent depended on a prior assessment of the circumstances by the interpreter. In his first report dealing with treaty interpretation, Waldock stated of the principles of interpretation used by courts and tribunals:

> They are, for the most part, principles of logic and good sense valuable only as guides ... Their suitability for use in any given case hinges on a variety of considerations which first have to be appreciated by the interpreter of the document ... In other words, recourse to many of these principles is discretionary rather than obligatory...[23]

Later, he was to acknowledge that 'in a sense all "rules" of interpretation have the character of "guidelines" since their application in a particular case depends so much on the appreciation of

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[21] Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, [1964] Yearbook of the ILC, vol II, 55, para 10 ('Articles 70-73 [on the interpretation of treaties] take their inspiration from the 1956 resolution of the Institute of International Law and from Sir G. Fitzmaurice's formulation of the "major" principles of interpretation in an article on the law and procedure of the International Court published in 1957.')

[22] Waldock, Third Report, 53, paras 1-2. See also Comments of Mr Rosenne, 765th Meeting of the International Law Commission, [1964] Yearbook of the ILC, vol I, 278, paras 38-39; Comment of the United States, Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, [1966] Yearbook of the ILC, vol II, 91, 93. Cf. Comments of Mr. Ago, 765th Meeting of the International Law Commission, [1964] Yearbook of the ILC, vol I, 280, para 78. Such scepticism was later also reflected by states at the Vienna Conference on the Law of Treaties, as well as in the earlier *Institut de Droit International* debates; see Comments of Ghana, United Nations Conference on the Law of Treaties, First Session: 26 March - 24 May 1968, Official Records: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, *Meeting of the Committee as a Whole - 31st Meeting,* UN Doc A/Conf.39/11, 166, paras 68-69; Lauterpacht, 'L'interprétation des traites', 368-72.

[23] Waldock, Third Report, 54, para 6.

the context and the circumstances of the point to be interpreted.'[24] Nevertheless, he considered that the topic could usefully form part of the ILC's work on treaties, and that a limited number of principles constituted the 'strictly legal basis of the interpretation of treaties.'[25] The 1964 draft articles proposed by Waldock enshrined the textualist approach to interpretation propounded in the resolution of the *Institut* and Fitzmaurice's academic writings,[26] the 'very essence' of which was that the text should be given its 'ordinary meaning' in the context of the treaty.[27] Recourse to extrinsic materials (preparatory work)[28] and certain materials intrinsic to the treaty (such as the object and purpose of the treaty)[29] was limited to instances in which the ordinary meaning was ambiguous or absurd, or in cases where the parties had intended to give the term a special meaning.[30]

By the time the Commission came to discuss the issue for a second time in 1966, Waldock's proposal had been watered down. The general rule was now less a bastion of ordinary meaning than a non-hierarchical melting pot of textualist, teleological, and intentionalist approaches.[31] Accordingly, while the majority of members of the Commission accepted the text as the starting point of interpretation, this should be seen more as a rejection of the intentionalist approach rather than adherence to the understanding of textualism as coextensive with literal

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[24] Waldock, Sixth Report, 94, para 1.
[25] Waldock, Third Report, 54, para 8.
[26] Waldock, Third Report, 56, para 13 ('the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point and purpose of interpretation is to elucidate the meaning of the text, not to investigate *ab initio* the intentions of the parties. While not excluding recourse to other indications of the intentions of the parties in appropriate cases, it makes the actual text the dominant factor in the interpretation of the treaty.')
[27] Waldock, Third Report, 56, para 14.
[28] Proposed Article 71(2), Waldock, Third Report, 52.
[29] Proposed Article 70(2)(a), Waldock, Third Report, 52.
[30] Proposed Article 70(3), Waldock, Third Report, 52.
[31] See Waldock, Sixth Report, 95, para 4 ('the Commission did not, it is believed, intend in 1964 to establish any positive hierarchy for the application of the means of interpretation mentioned').

interpretation.[32] Emblematic of this shift was the acknowledgement in Waldock's 1966 proposed articles that ordinary meaning cannot be determined without reference to context *and* to the object and purpose of the treaty. This laid the groundwork for the familiar wording of Article 31(1) of the Vienna Convention. Indeed, the idea that literal interpretation was given primacy over other methods of interpretation was given short shrift by Waldock himself. In response to a query by the United States regarding the apparent primacy given to ordinary meaning in the 1964 draft, he stated that the validity of such a claim was 'open to doubt', particularly in light of the recognition that a special meaning may displace the ordinary meaning of a term.

The states parties to the Vienna Conference on the Law of Treaties accepted the approach laid down by the ILC in 1966 with minor changes,[33] although not without some resistance. A failed last-ditch amendment by the U.S. delegation, led by Myres McDougal, attempted to place preparatory work on a level footing with the text of the treaty, thereby creating one unified article that avoided the 'obscurantist tautology' of ordinary meaning.[34] Waldock, appearing as Expert Consultant to the conference, rebutted McDougal's critique, emphasising that 'nothing could have been further from the Commission's intention than to suggest that words had a "dictionary" or intrinsic meaning in themselves.'[35]

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[32] See Draft Articles on the Law of Treaties with Commentaries, [1966] Yearbook of the ILC, vol II, 220, para 9 ('Once it is established - and on this point the Commission was unanimous - that the starting point of interpretation is the meaning of the text, logic dictates that the 'ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose should be the first element to be mentioned.')

[33] The only amendment was the inclusion of a consideration of the object and purpose as a way to reconcile divergences between equally authoritative treaty texts in different languages.

[34] United Nations Conference on the Law of Treaties, First Session, *Meeting of the Committee as a Whole - 31st Meeting*, 166, paras 38-41.

[35] United Nations Conference on the Law of Treaties, First Session, *Meeting of the Committee as a Whole - 33rd Meeting*, 177, para 70.

II. LOOKING INTO THE CRUCIBLE

It is easy to see why some claim that the textualist school of interpretation reigned, and still reigns to this day, victorious over the intentionalist and teleological schools. However, on closer inspection, the flexibility afforded to the interpreter by the 'crucible' approach of the ILC in effect allows almost all interpretations to be justified by reference to Articles 31 and 32 of the VCLT. As a result, the utility of the Vienna Convention as a benchmark against which to assess the permissibility of an interpretation is limited. Moreover, to claim that the provisions of the Vienna Convention constitute the *only* framework in which to evaluate the permissibility of interpretation would afford great latitude to states to unilaterally determine their own obligations.

i. The Victory of Textualism?

Before developing this argument further, we must turn to examine the claim that textualism won the day, finding its place as the interpretive method favoured by the VCLT.[36] What is interesting – and has attracted little attention – is the shift in the understanding of textualism that occurred in the ILC.

As noted above, Waldock's textualism initially went hand-in-hand with a more or less literal form of interpretation that relegated other considerations, such as the object and purpose of the treaty, to a secondary rung. According to him, ordinary meaning was the 'very essence' of the textualist approach.[37] However, this co-existence attenuated as time went on, notably with the acknowledgement that the 'ordinary meaning' of a term cannot be fully accounted for in the absence of context and object and purpose. The literal form of interpretation that one might

[36] J.-M. Sorel & V. Boré Eveno, 'Article 31', in Corten & Klein (eds), *The Vienna Conventions on the Law of Treaties*, 829; Orakhelashvili, *The Interpretation of Acts and Rules*, 309. In arbitral practice, see for example, *RSM Production Corporation v Grenada,* ICSID Case No. ARB/05/14, Award, 13 March 2009, para 383.

[37] Waldock, Third Report, 56, para 14. See also, Proposed Article 70(2)(a), Waldock, Third Report, 52.

have been tempted to attribute to Waldock at the start of the process softened to a more nuanced form of textualism; one that recognises the power and inevitability of context writ large, and one that relinquishes power in the presence of more authoritative manifestations of the parties' intent. It was this more nuanced form of textualism that prevailed, recognising that the presumptive, defeasible primary object of interpretation was the text.

However, the attenuated form of textualism that is instantiated in Articles 31 and 32 requires no more of the interpreter than the use of the text as the starting point of their enquiry; it says little about how to interpret the text itself, whilst at the same time recognising that the *telos* of the instrument may play an important role, and keeping open the possibility that the intention of the parties might be determinative of meaning. As Michael Waibel has noted:

> At first sight, the rules on interpretation found in Articles 31–33 VCLT seem to have settled the old debates ... [yet] the VCLT merely reduced these disagreements [between textualists and intentionalists] to writing, and left substantial leeway for idiosyncratic approaches to interpretation within the bounds staked out by the VCLT's broad interpretive principles.[38]

Once faced with the text, the interpreter is left with a variety of factors that are 'general, question-begging, and contradictory.'[39] The ordinary meaning of a term might be completely at odds with the object and purpose of the treaty: how, then, is the interpreter to balance these competing factors against each other? The provisions of the VCLT provide no guidance, leaving the decision to the skill and good judgment of the interpreter.[40]

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[38] M. Waibel, 'Demystifying the Art of Interpretation' (2011) 22 [2] EJIL 571, 573.

[39] I. Brownlie, *Principles of Public International Law* (6th edn OUP 2003) 602.

[40] Philip Allott has criticised Article 31(1) in the following terms: 'A legal ship containing a bolted-together contradiction is not a seaworthy legal ship. Article 31 is accordingly worthless as a general *rule* of interpretation. It is a poem about interpretation.' P. Allott, 'Interpretation - An Exact Act', in Bianchi, Peat & Windsor (eds), *Interpretation in International Law,* 377.

Moreover, it is clear that the flexibility afforded to the interpreter by the provisions of the Vienna Convention was intentional. In his Third Report, Waldock recognised that the interpreter was vested with a wide degree of latitude to appreciate the circumstances and pursue the method of interpretation that they deemed appropriate. He acknowledged that, 'if the textual method of interpretation predominates [in international jurisprudence], none of these approaches is exclusively the correct one, and that their use in any particular case is to some extent a matter of choice and appreciation.'[41] It was this consideration that informed the approach ultimately adopted by the ILC, recognising a plurality of alternative, often contradictory, factors that the interpreter *may* take into account, depending on their appreciation of the circumstances. Like a hapless (or, perhaps, incredibly fortunate) cook, Waldock thought that 'all the various elements, so far as they are present in any given case, would be thrown into the crucible and their interaction would then give the legally relevant interpretation.'[42]

However, in reality, interpreters are not hapless cooks that are simply presented with the appropriate result after mixing the ingredients. Rather, they must determine what weight to give to the object and purpose of the treaty, to the context, and to the ordinary meaning, with an eye to countervailing special meanings, all of which may be justified by reference to the VCLT and all of which depends on the circumstances in which the interpretation takes place. They might have the ingredients listed on the recipe, but they certainly do not have the quantities.[43]

It is an appreciation of the circumstances in which the interpretation occurs that determines which elements of the general rule and subsidiary means of interpretation are to be given weight

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[41] Waldock, Third Report, 54, para 7. Note that 'textualism' here was understood in the early sense of the term, i.e. as coextensive with literal interpretation.
[42] Waldock, Sixth Report, 95, para 4.
[43] Cf. J. Klabbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization' (2005) 74 Nordic Journal of International Law 405, 409-11.

in a particular instance. To fully appreciate the appropriateness of an interpretation, it is therefore unavoidable that one has regard to the context in which the interpreter in functioning. What constitutes an acceptable interpretation by the European Court of Human Rights will frequently be different to that which constitutes an acceptable interpretation by the WTO Appellate Body or an international investment arbitration tribunal. The provisions of the Vienna Convention permit a wide range of interpretations on the very basis that the appropriate interpretation depends very much on the context in which the interpreter in operating.[44] As a result, to use Articles 31 and 32 as the benchmark against which to assess interpretation would be to neglect the context-specificity of interpretation that underpinned the approach of the ILC.

ii. Auto-Interpretations as Auto-Decisions

Not only would it be unhelpful to use the Vienna Convention as the evaluative framework for interpretation, but it would also be undesirable from a normative point of view. On the international plane, it is accepted that states and international organisations – both the sources and the subjects of international law – 'have a legitimate and proper role to play in the interpretation of international law'.[45] Indeed, states 'auto-interpret' their own legal obligations on a daily basis, basing their actions on what they (or, more correctly, their legal advisors) believe to be the correct interpretation of law.[46]

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[44] G. Abi-Saab, 'The Appellate Body and Treaty Interpretation', in G. Sacerdoti *et al.*, *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP 2006) 460; J. Klabbers, 'Virtuous Interpretation', in M. Fitzmaurice, O. Elias & P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010) 34. See also, C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 291.

[45] Waibel, 'Demystifying the Art of Interpretation', 584. The classic formulation of auto-interpretation was by Leo Gross; L. Gross, 'States as Organs of International Law and the Problem of Autointerpretation' in G.A. Lipsky (ed), *Law and Politics in the World Community* (University of California Press 1953). More formal procedures which allow states to authoritatively interpret their own obligations, such as Article IX:2 of the WTO Agreement, are normally referred to as 'authentic' or 'authoritative' interpretation; see Waldock, Sixth Report, 98-99, para 18.

[46] Gross argues that the right of states to interpret their own obligations comes from the 'organizational insufficiency' of international law; in other words the lack of a binding, compulsory jurisdiction. However, laws – both international and domestic – aim to affect the actions of its subjects, and hence there is undoubtedly an 'auto-interpretive' function inherent in the nature of law itself; Gross, 'States as Organs of International Law', 76-77. See

However, to unquestioningly accept interpretations based on the VCLT without further enquiry would allow states to 'auto-determine' their own obligations.[47] If one's sole evaluative framework for interpretation is the VCLT, no interpretation would be able to be criticised as being better or worse, desirable or undesirable, appropriate or inappropriate.[48] The wide range of interpretive methodologies accommodated by the VCLT would hence allow states to pick and choose which interpretation best served their purpose in any given case, allowing them to circumvent their obligations with impunity.

Without enquiring further as to the value judgments that underpin the interpretations advanced, those that examine the interpretation would be left without the tools to critically assess such an approach.[49] Whilst the aim here is not to claim that the VCLT provisions should be abandoned, it is clear that a proper evaluation of interpretation cannot be based solely on the provisions of the Vienna Convention. However, before exploring what alternative framework could be appropriate, it is necessary to examine the other reasons that the VCLT is not a suitable framework within which to assess interpretation.

III. Supervening Customary Rules of Interpretation

In addition to the arguments elaborated in the previous section, it is not possible to accept the argument that the 'text of the Vienna Convention... [affirms] that the rules on treaty

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also, Orakhelashvili, *The Interpretation of Acts and Rules*, 511-15; O.K. Fauchald & A. Nollkaemper, 'Introduction', in O.K. Fauchald & A. Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 9.

[47] Cf. Gross, 'States as Organs of International Law', 81.

[48] Cf. J. Klabbers, *International Law* (CUP 2013) 364 (arguing that the VCLT provisions have 'given some support (although often quite illusory support) to the claim of tribunals that their reasoning and the decisions arrived at had an objective validity even before they reached them...').

[49] See also, F. Zarbiyev, 'A Genealogy of Textualism in Treaty Interpretation', in Bianchi, Peat & Windsor (eds), *Interpretation in International Law*, 261; F. Schauer, 'Formalism', (1988) 97 Yale LJ 509, 513-14.

interpretation are fixed'[50] and hence provides a suitable framework within which to evaluate interpretation. The reason is simple: the provisions of the Vienna Convention do not constitute an immutable or exhaustive enumeration of the rules of interpretation. Whilst Articles 31 and 32 of the Vienna Convention bind 114 states as conventional law and all states as customary law, it is clear that a body of uncodified rules of interpretation could exist in parallel to the VCLT provisions, or that such a body could emerge in the future. This is an expression of the inherent evolutive nature of custom or the maxim of *lex posterior derogat legi priori.*[51]

It is already the case that extant uncodified rules of interpretation have been acknowledged to exist outside the framework of the VCLT. The rules of interpretation applied by the panels and Appellate Body of the WTO provide the prime example of this. Article 3.2 of the Dispute Settlement Understanding mandates adjudicatory bodies within the WTO to apply the 'customary rules of interpretation of public international law.' This has been understood not only to refer to Articles 31-33 of the VCLT,[52] but also to uncodified interpretive rules, such as the principle of effective interpretation or *effet utile.*[53] The ILC considered that this principle was encompassed in the Article 31(1) obligation to interpret in good faith and in light of the object and purpose of the treaty, and hence was not explicitly included in the codification.[54] However, it has been recognised as an autonomous 'internationally recognized interpretative principle' within the WTO,[55] with an existence quite separate from Articles 31 and 32. As Isabelle Van Damme

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[50] Orakhelashvili, *The Interpretation of Rules and Acts*, 309.

[51] J. Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003) 96-97.

[52] See Appellate Body Report, *US-Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R (29 April 1996), 16-17; Appellate Body Report, *Japan-Taxes on Alcoholic Beverages* WT/DS8 & 10 & 11/AB/R (4 October 1996), 10; Appellate Body Report, *US-Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada* WT/DS257/AB/R (19 January 2004), para 59.

[53] See for example, Appellate Body Report, *US-Gasoline,* 21; Appellate Body Report, *US-Continued Dumping and Subsidy Offset Act of 2000* WT/DS217 & 234AB/R (16 January 2003), para 271. See also Van Damme, *Treaty Interpretation by the WTO Appellate Body,* 282, and 275-303 generally.

[54] Draft Articles on the Law of Treaties with Commentaries, 219.

[55] Appellate Body Report, *US-Subsidy Offset Act,* para 271.

has noted, this principle permits panels and the Appellate Body to correct or confirm interpretations arrived at using the Vienna Convention provisions, as well as providing 'an independent ground on which the interpreter relies to construe the meaning of the treaty language'.[56]

If one were to focus on the provisions of the VCLT as the sole evaluative framework for interpretation, not only would one neglect the extant, uncodified interpretive principles that have been acknowledged to exist, but also one would also foreclose the possibility of accepting an interpretation made according to a novel interpretive rule. To remedy this situation, one could claim that we should nevertheless adopt an evaluative framework based on positive law, understood as including – but not limited to – the provisions of the VCLT. The next section demonstrates the flaws in such an approach by questioning the counter-intuitive notion that the rules of interpretation are themselves subject to the interpretive strictures that they embody.

IV. Interpreting the Rules of Interpretation

This section argues that the rules that purport to bind interpretation must themselves be subject to interpretation based on factors extrinsic to the rules.[57] To claim otherwise would be to assert that the provisions of the VCLT or uncodified customary rules of interpretation are 'easy cases' for which no interpretation is necessary, which it is argued is patently false.[58] As a result of their

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[56] Van Damme, *Treaty Interpretation*, 282-83. See for example, Appellate Body Report, *EC-Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R (12 March 2001), para 115; Appellate Body Report, *US-Subsidies on Upland Cotton (Article 21.5 - Brazil)* WT/DS267/AB/RW (2 June 2008), 237.

[57] The main argument here has been called one of 'infinite regress', whereby the rules of interpretation need to be interpreted by other rules which themselves need to be interpreted. This was suggested, but not analysed in-depth, in Klabbers, 'On Rationalism in Politics', fn 43.

[58] This section will focus on the provisions of the VCLT, although the argument that the rules of interpretation must themselves be subject to interpretation is *a fortiori* for uncodified rules of interpretation, such as the principle of effective interpretation.

inability to constrain interpretation, the provisions of the VCLT fail to offer a useful benchmark against which to assess interpretation.

To commence, let us take an example of how the VCLT provisions are approached. Richard Gardiner interprets the provisions of Articles 31 and 32 by reference to the 'ordinary meaning' of those provisions.[59] However, if he were to follow the ILC's intended approach, there is no reason that 'ordinary meaning' should be privileged over, for example, the object and purpose of the treaty. Furthermore, his approach highlights ambiguity inherent in the very phrase 'ordinary meaning', which is sometimes equated to the dictionary meaning of the term,[60] whilst at other times it is not.[61] Considering the flexibility afforded by the VCLT, such choices are understandable; indeed, they are inevitable. But this also suggests that the rules of interpretation must themselves by interpreted according to the prior choices of the interpreter, themselves unconstrained by the rules.[62]

One might retort that the rules of interpretation do not have to be interpreted, but can simply be applied.[63] This brings us to the familiar jurisprudential territory of whether 'clear' legal rules can be applied without interpretation. Whilst the debate between H.L.A. Hart and Lon Fuller looms

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[59] For other attempts to interpret the rules of interpretation using those very provisions, see McLachlan, 'The Principle of Systemic Integration'; B. McGrady, 'Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: *EC–Biotech Products* and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention' on the Law of Treaties' (2008) 43 Journal of World Trade 589.

[60] See for example, Gardiner's interpretation of 'ordinary meaning' under Article 31(1); Gardiner, *Treaty Interpretation*, 164.

[61] See for example, Gardiner's interpretation of what is 'relevant' under Article 31(3)(c); Gardiner, *Treaty Interpretation*, 260.

[62] A similar point has been made by A. Tutt, 'Interpretation Step Zero: A Limit on Methodology as "Law"' (2013) 122 Yale LJ 2055.

[63] See for example, Orakhelashvili, *The Interpretation of Acts and Rules*, 309 ('The text of the Vienna Convention, the process of its drafting and the practice of its application are all unanimous in affirming that the rules of treaty interpretation are fixed rules and do not permit the interpreter a free choice among interpretative methods.')

large in this area, perhaps the most forceful contemporary case that has been made in support of the proposition is by Andrei Marmor.[64]

The main goal of Marmor's argument is to rebut Lon Fuller's claim that legal rules can only be understood in light of the purpose that they were designed to serve.[65] He argues that this cannot be true, as we often know what action a legal rule requires of us with no further enquiry. For Marmor, the ability to comprehend what action a rule requires is to understand that rule.[66] As a result, interpretation is relegated to an auxiliary role, required 'only when the formulation of the rule leaves doubts as to its application in a given set of circumstances.'[67] In order to fully understand this claim and its potential application to the VCLT, it is convenient to briefly describe Ludwig Wittgenstein's work on rule-following upon which Marmor's argument is based.[68]

Wittgenstein's later philosophy was a reaction to the preoccupation of philosophers with the search for the logically perfect language embodied in a system of calculus, notably propounded

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[64] A. Marmor, *Interpretation and Legal Theory* (2nd ed Hart 2005) 112-18. It seems that the works of Wittgenstein and the Ordinary Language School of philosophy also directly influenced Hart, especially his distinction between the core and penumbral meanings of words; see H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 2-4; H.L.A. Hart, *The Concept of Law* (2nd edn OUP 1997) vi, 14; N. Stavropoulos, 'Hart's Semantics', in J. Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (OUP 2001); A. Lefebvre, 'Hart, Wittgenstein, Jurisprudence', (2011) 154 Telos 99, 100.

[65] L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard LR 630, 662-63 ('the most obvious defect of his [Hart's] theory lies in its assumption that problems of interpretation typically turn on the meaning of individual words ... If the rule excluding vehicles from parks seems easy to apply in some cases, I submit this is because we can see clearly enough what the rule 'is aiming at in general'...)

[66] Marmor, *Interpretation and Legal Theory*, 117. For a comprehensive critique of Marmor's argument, see Hershowitz, 'Wittgenstein on Rules', 633-36.

[67] Marmor, *Interpretation and Legal Theory*, 118.

[68] Numerous philosophers of law have used Wittgenstein's writings on rule-following in a legal context; see for example, B. Bix, *Law, Language and Legal Determinacy* (OUP 1995) 36-62; D. Patterson, 'Law's Pragmatism: Law as Practice and Narrative' (1990) 76 Virginia LR 937; B. Langille, 'Revolution Without Foundations: The Grammar of Scepticism in Law' (1988) 33 McGill LJ 451; C. Yablon, 'Law and Metaphysics' (1987) 96 Yale LJ 613. For a useful anthology of legal works drawing on Wittgenstein's work more generally, see A. Halpin, *Reasoning With Law* (Hart 2001) 138-41.

by Gottlob Frege, Bertrand Russell and Alfred North Whitehead.[69] As a result of the power and perspicuity of the new logical calculus 'it was virtually unavoidable that philosophers, including the inventors of the calculus, should raise the question of the relationship between the formal calculus and natural language.'[70] Analysing language along the lines of formal calculus reinforced the impression that words – like symbols in calculus – were representations that correlated with reality.[71] In other words, it adopted and reinforced the Augustinian view that the meaning of a word is the object that it stands for.[72]

Whilst Wittgenstein initially subscribed to such a view in his *Tractatus Logico-Philosophicus*[73] – his only book published during his lifetime – it was a refutation of this approach to language (and to philosophical problems more generally) that underpinned his linguistic philosophy in the posthumously published work, *Philosophical Investigations*.[74] In that book, he firmly rejected the traditional conception of meaning that pointed 'to something exterior to the proposition which endows it with sense.'[75] In most cases, the meaning of words, Wittgenstein argued, does not come from the object that they name, but rather from an explanation of the correct usage of the word. Explanations are 'concrete, and do not so easily mislead us, in the way 'meaning' does, to chase shadows.'[76] The rules for the use of a word – in Wittgenstein's terminology, its 'grammar'[77]

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[69] A.N. Whitehead & B. Russell, *Principia Mathematica to *56* (CUP 1962; originally published in three volumes in 1910, 1912 and 1913); G. Frege, *Begriffsschrift* (Halle 1879).

[70] G.P. Baker & P.M.S. Hacker, *Wittgenstein: Understanding and Meaning - Part I: Essays* (2nd edn Blackwell 2005) 134.

[71] 'Semantics, it seemed, dealt with the 'interpretation' of the symbolism and so with the resultant determination of the meaning of *sense* of sentences. This was conceived to be a matter of *correlating the signs of the symbolism with reality';* Baker & Hacker, *Part I,* 135.

[72] See Augustine, *Confessions*, I. 8, quoted in L. Wittgenstein, *Philosophical Investigations,* §1. For a modern formulation - albeit one that was later qualified, see B. Russell, *The Principles of Mathematics* (CUP 1903) 47 ('Words all have a meaning, in the simple sense that they are symbols which stand for something other than themselves'). See also T. Endicott, 'Law and Language', *Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), E.N. Zalta (ed.) <http://plato.stanford.edu/archives/spr2014/entries/law-language/>.

[73] Baker & Hacker, *Part I,* 26-28.

[74] See for example, Wittgenstein, *Philosophical Investigations*, §13.

[75] A. Biletzki & A. Matar, 'Ludwig Wittgenstein', *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), E.N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2014/entries/wittgenstein/>.

[76] Baker & Hacker, *Part I,* 34, quoting L. Wittgenstein, *Manuscript 116 (vol. XII),* 32f.

– are rules that include explanations of the word's meaning and correct usage of the word. These rules allow us to answer the questions 'What does "W" mean?', or 'What is the meaning of "W"?, or 'What is (a) W?'[78] To understand a word is to be able to use it in accordance with its 'rules of grammar', which also provide an evaluative framework against which the correctness of word usage is assessed.[79]

Rule-following was hence of central importance to Wittgenstein's work and a large part of *Philosophical Investigations* directly addresses the issue.[80] His preoccupation was the rebuttal of the argument – referred to as the 'rule-following paradox' – according to which 'rules cannot really guide one at all, since whatever one does can be made compatible with the rule on some interpretation'.[81] An illustrative example helps to bring this point into focus.[82]

Consider being faced with a calculation 68 + 57, and suppose that you have never made calculations with numbers greater than 57 before. Obviously, the answer that you would give is 125. However, Saul Kripke invoked a hypothetical 'bizarre sceptic' to challenge this point. Kripke's sceptic claims that the correct answer is 5, based on the way that he or she has used the sign '+' in the past. The sceptic takes issue with the way that we understand '+' on the basis of our finite sample pool instantiating this function. Considering that in the past we have simply had chance to calculate with numbers smaller than 57, the sceptic continues, 'I used 'plus' and '+'

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[77] Note that 'grammar' here is not employed in the conventional sense of the term, but rather a broader sense that includes 'a wide variety of practices connected with its use and the criteria and background conditions that govern its normal application'; E. Wolgast, *The Grammar of Justice* (Cornell UP 1987) x.

[78] Baker & Hacker, *Part I,* 146.

[79] Baker & Hacker, *Rules, Grammar and Necessity*, 51.

[80] See in particular, Wittgenstein, *Philosophical Investigations*, §§185-202. Wittgenstein used 'interpretation' in a specific sense, namely that an interpretation is a 'substitution of one expression of the rule for another'; Wittgenstein, *Philosophical Investigations*, §201.

[81] Baker & Hacker, *Rules, Grammar and Necessity*, 126; Wittgenstein, *Philosophical Investigations*, §201.

[82] S.A. Kripke, *On Rules and Private Language* (Blackwell 1982) 7-14.

to denote a function which I will call 'quus", which is defined as: 'x quus y = x + y, if x, y < 57; otherwise, x quus y = 5'. Kripke sums up the sceptic's challenge as follows:

> The sceptic doubts whether any instructions I have myself used in the past compel (or justify) the answer '125' rather than '5'. He puts the challenge in terms of a sceptical hypothesis about a chance in my usage. Perhaps when I used the term 'plus' in the *past,* I always meant quus: by hypothesis I never gave myself any explicit directions that were incompatible with such a supposition.[83]

Not only is one's past usage of 'plus' thrown into question, but also 'the possibility of my meaning either plus or quus by using them in the present is impossible as well. If there is no fact of the matter whether I mean plus or quus ... I cannot use words in accord with the rules for their meaning.'[84] The provocative implication is that rules cannot guide behaviour.

Wittgenstein himself acknowledged that there is a way of 'grasping a rule which is *not* an interpretation'.[85] The rule-following paradox is based on the mistaken assumption that a rule can only be followed by interpreting it, 'that interpretation is necessary to bridge a gap between the rule and the action it requires.'[86] Instead, Wittgenstein claimed that to follow a rule is to master a technique and to act in accordance with a normative practice in the appropriate circumstances.[87] One knows, for example, which direction is 'left' not because of any interpretation, but because the use of the word in accordance with its 'rules of grammar' is a practice that we have mastered.

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[83] Kripke, *On Rules and Private Language*, 13.
[84] S. Hershowitz, 'Wittgenstein on Rules: The Phantom Menace' (2002) 22 [4] OJLS 619, 622.
[85] Wittgenstein, *Philosophical Investigations*, §201.
[86] Hershowitz, 'Wittgenstein on Rules', 628.
[87] The term 'practice' is unclear in Wittgenstein's writings. Whether this practice finds its roots in a community of like-minded rule-followers (Kripke) or simply in a regularity of behaviour (Baker & Hacker) was one of the great debates between Wittgensteinian philosophers; see, Kripke, *On Rules and Private Language* 89-113; Baker & Hacker, 'Following Rules, Mastery of Techniques, and Practices', in Baker & Hacker, *Rules, Grammar and Necessity*, 150-56.

It has been instilled in us over time: others correct us if we misuse the word, and we encounter its consistent and constant use in day-to-day life.[88]

Applied to the provisions of the VCLT, the initial attraction that Marmor's version of Wittgenstein's rule-following argument has is clear. To recap, Marmor claimed that certain legal rules do not need interpretation, as we intuitively know what actions are in accordance with the rule. In the context of interpretation, it might be claimed that we know what it means to act in accordance with Articles 31 and 32 hence those provisions need no interpretation.[89] The corollary of such an argument would be that, in some cases at least, the VCLT guides the behaviour of the interpreter and is the normative framework within which one can assess the appropriateness of an interpretation.

Such an argument would be wrong for several reasons. First, Marmor's transposition of Wittgenstein's theory does not account for differences in the use of the word 'interpretation' in Wittgenstein's work, on the one hand, and in legal parlance, on the other.[90] Wittgenstein defines interpretation in a specific way: 'interpretation is the substitution of one expression of the rule for another.'[91] In the legal setting, however, 'interpretation' is normally used in a wider, different sense, most commonly to denote an enquiry as to what action the law requires when faced with an ambiguous or vague term. These two uses of the term are different in one crucial way: whilst the former presupposes the ability to act in accordance with the rule, the very purpose of interpretation in the latter is to elucidate what action accords with the rule. Without taking a view as to whether legal rule-following inevitably involves interpretation (in the non-Wittgensteinian sense of the term), suffice to say that applying his claim that rules may be followed without

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[88] Similarly, see Wittgenstein, *Philosophical Investigations*, §198.
[89] Cf. Orakhelashvili, *The Interpretation of Acts and Rules*, 309.
[90] Hershowitz, 'Wittgenstein on Rules', 634-35.
[91] Wittgenstein, *Philosophical Investigations*, §201.

interpretation without accounting for this difference in usage of terminology is fundamentally flawed.

Second, Marmor's argument rests on the premise that the rules of which Wittgenstein speaks are the same as or analogous to legal rules. However, it is clear that Wittgenstein did not aim to create a general theory of rule-following that encompassed legal rules – indeed, it would have been antithetical to his later approach to philosophy to attempt such a feat.[92] He 'aimed not to write a book on rules but to examine specific problems arising out of insights into the normative nature of language, of logic, and of reasoning.'[93] Indeed, the examples that Wittgenstein invoked did not raise questions as to whether a particular response would be right or wrong.[94]

Nevertheless, might the understandings that he brought to bear on these rules apply also to legal rules? Scott Hershowitz has forcefully argued that this cannot be the case.[95] Wittgenstein's basic argument regarding rule-following is that, at a certain point, the rules of grammar cannot be explained by reasons. In this way, our rule-following is unreflective: 'we apply rules without justification, without reasons, based on how we find it natural to go on given our training.'[96] We cannot explain, for example, why we add two numbers together when there is a plus sign in between them; we just do so because we know that it is the correct action.

Legal rules, Hershowitz rightly claims, are fundamentally different: 'we offer justifications and reasons for the way we apply legal rules ... And when doubts are raised, we almost always

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[92] Biletzki & Matar, 'Ludwig Wittgenstein', *The Stanford Encyclopedia of Philosophy*.
[93] G. Baker & P.M.S. Hacker, *Rules, Grammar and Necessity* (1st edn, Blackwell 1988) 39.
[94] Bix, *Law, Language and Legal Determinacy,* 36.
[95] Hershowitz, 'Wittgenstein on Rules'. See also Bix, *Law, Language and Legal Determinacy*, 51.
[96] Hershowitz, 'Wittgenstein on Rules', 635.

respond with reasons why one understanding of what the law requires is preferable to another.'[97] That is not to say that acting in accordance with some legal rules is unreflective, but rather that this is more rare than is the case with the rules of language or arithmetic. Moreover, the idea of unreflective normative practices presupposes that there is a clear regularity of practice as to what constitutes correct and incorrect actions according to the rule. It is only with this clarity and regularity that one can master the technique of acting in accordance with the rule, enabling one to do so unreflectively.

The provisions of the VCLT are neither applied unreflectively, nor have they created a clear regularity of practice that determines what accords with the rule and what does not. Richard Gardiner's interpretation of the VCLT provisions provides a neat illustrative example of this.[98] The flexibility that the provisions afford to the interpreter enables myriad different factors to be taken into consideration when determining what they consider would be an appropriate interpretation. Just as this flexibility affords no guidance, it also means that application of the rules requires reflection and an appreciation of the circumstances in which interpretation is taking place.[99]

To conclude, the VCLT rules are themselves liable to interpretation and hence cannot constrain treaty interpretation. As a result, the provisions of the VCLT fail to offer a useful benchmark against which to test the permissibility of specific interpretive methodology.

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[97] Hershowitz, 'Wittgenstein on Rules', 636.
[98] See text accompanying fns 59-61.
[99] Note that this is quite in keeping with the ILC's conception of how the VCLT provisions would operate.

CONCLUSION

The purpose of this chapter has been to argue that Articles 31 and 32 of the Vienna Convention do not constitute the appropriate framework within which to assess whether the use of domestic law in interpretation is permissible or desirable. The ubiquity of the VCLT in the literature and the largely unwavering reliance on its provisions as the benchmark for interpretation has required us to address the argument against its use as an evaluative framework in detail. Three arguments have been adduced to this end.

First, it was demonstrated that the provisions of the Vienna Convention leave a great deal of latitude to the interpreter, allowing them to choose from textual, intention, and teleological elements present in the general rule. This flexibility was intended by the ILC, the members of which understood that the appropriate interpretation could only be determined with a consideration of the context in which the interpreter is operating. In the abstract, virtually any interpretation could be justified if the VCLT is taken as the benchmark for permissibility, rendering it unhelpful as a framework within which to evaluate interpretation. An evaluative framework must be able to take into account this context-specific nature of interpretation. Second, a focus on the VCLT as the framework within which to evaluate interpretation would neglect uncodified rules of interpretation that have been acknowledged to exist. Third, a more searching critique argued that the provisions of the Vienna Convention themselves must be interpreted by reference to considerations extrinsic to Articles 31 and 32. As a result, it cannot be maintained that the VCLT provisions bind the interpreter. To use Articles 31 and 32 as a framework within which to assess the permissibility of a particular interpretive method would hence be misguided.

The following chapter elaborates an alternative framework to Articles 31 and 32 of the VCLT, based on the concept of legitimacy. By adopting this framework, we are able to comprehend why different interpretive approaches are more accepted in certain contexts than others. At the heart of the theory advanced is the idea that interpretations must be congruent with the values that underpin the legal regime in which the interpreter is functioning.

3.

LEGITIMATE INTERPRETATION

INTRODUCTION

Legitimacy is something of an enigma: a 'slippery concept',[1] which has been treated with caution in international legal discourse.[2] For some, it refers to a quality of a rule or action taken in accordance with the appropriate process;[3] to others, it refers to the positive impact of a law in light of the substantive goals of society;[4] on another view, it simply refers to subjects' belief that a certain rule, actor or action is endowed, by whatever means, with 'legitimacy'.[5]

The ambiguity of the term has opened the door to critics who argue that its subjective nature negates any analytic utility. According to Martti Koskenniemi, 'Legitimacy is not about normative substance. Its point is to *avoid* such substance but nonetheless to uphold a *semblance* of substance.'[6] However, others argue that, if defined carefully, the concept can be a useful complementary analytical tool that 'does not require lawyers to abandon the tools of their trade, but rather calls for reflection on how such tools are to be used.'[7]

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[1] M. Hough *et al.*, 'Legitimacy, Trust, and Compliance: An Empirical Test of Procedural Justice Theory using the European Social Survey', in J. Tankebe & A. Liebling (eds.), *Legitimacy and Criminal Justice*: An International Exploration (OUP 2013) 330.

[2] J. Crawford, 'The Problems of Legitimacy-Speak' (2004) 98 ASIL Proc. 271.

[3] See for example, M. Elsig, 'The World Trade Organization's Legitimacy Crisis: What does the Beast Look Like?', (2007) 41 Journal of World Trade 75, 86-87.

[4] F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999); F. Kratochwil, 'On Legitimacy', (2006) 20 International Relations 302; C.A. Thomas, 'The Uses and Abuses of Legitimacy in International Law', (2014) 34 OJLS 729, 752 (claiming that the legitimacy enjoyed by the WTO is partly as a result of the effective lowering of tariffs).

[5] M. Weber, *Economy and Society* (Univ. of California Press 1978) 53.

[6] M. Koskenniemi, 'Book Review: T.M. Franck, The Power of Legitimacy Among Nations', (1992) 86 AJIL 175.

[7] Thomas, 'The Uses and Abuses of Legitimacy', 732.

Since the pioneering work of Tom Franck in the late 1980s,[8] the discourse of legitimacy has become firmly rooted in international law. It is often used as a normative framework when international law itself is judged to be inadequate or insufficient (one need only recall the conclusion that the NATO intervention in Kosovo was 'illegal, yet legitimate').[9] This has led to the criticism that legitimacy provides both actors and evaluators a language with which to circumvent the normative strictures of international law, enabling them to rely upon a more ambiguous, nebulous concept to justify their actions. Whilst in many instances, this critique has purchase, for the purposes of interpretation, it is precisely the autonomous nature of legitimacy that offers an opportunity for evaluation that the provisions of the VCLT do not.

This chapter elaborates an alternative analytical framework for interpretation, drawing on recent scholarship that forms part of the 'turn to legitimacy' in international law, criminology, and the philosophy of law. Two considerations are at the basis of this line of enquiry. First, international law, like any law, must affect the behaviour of subjects within the legal system in order to fulfil its function. In a decentralised system such as international law, which exists without a binding and compulsory jurisdiction or means of enforcing compliance, inducing normative compliance through non-coercive means takes on even greater importance. Recent criminological studies have demonstrated a link between subjects' perception of the legitimacy of law and the legitimacy of law-applying institutions, on the one hand, and voluntary compliance with the law, on the other. This provides empirical support to Franck's claim that perceived legitimacy engenders compliance.[10] An enquiry into legitimacy is therefore purposive: if we are able to

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[8] T.M. Franck, 'Legitimacy in the International System', (1988) 82 AJIL 705; T.M. Franck, *The Power of Legitimacy Among Nations* (OUP 1990). Although it has been noted that legitimacy in different guises has been examined for centuries; M. Zelditch, Jr., 'Theories of Legitimacy', in J.T. Jost & B. Major (eds), *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations* (CUP 2001) 33 (noting that the history of legitimacy spans '24 centuries'); S.P. Mulligan, 'The Uses of Legitimacy in International Relations', (2005) 34 Millennium 349, 359-60.

[9] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 186.

[10] Franck, *The Power of Legitimacy Among Nations,* 34.

discern what is likely to be perceive as a legitimate interpretation, we are also able to work out which interpretation is more likely to fulfil the behaviour-modifying objective of law.

Second, it was argued in the previous chapter that the Vienna Convention is not the appropriate framework within which to assess the use of domestic law in interpretation. Legitimacy, as an alternative normative framework, offers this possibility. Crucially, by using a conception of legitimacy to evaluate interpretation, we are able to take account of the context in which the interpretation takes place and the values underpinning the judicial role in different legal regimes.

This chapter is divided into two sections. The first section links the purpose of law to subjects' perception of legitimacy, drawing on recent criminological studies that examine procedural justice theory. It continues to consider the pertinence of these works for international law generally, and interpretation by international courts and tribunals more specifically. The second section moves to elaborate a theory of interpretive legitimacy based on three elements: interpretive authority, procedural justice, and shared values. Although myriad conceptions of the legitimacy of rules, institutions, or actions have been elaborated, interpretive legitimacy stands apart, straddling the gap between the legitimacy of the interpreting institution and the legitimacy of the interpreted rule as applied. As such, a novel theory of legitimacy specific to interpretation is required, one which accounts for both the procedural and substantive elements of legitimacy pertinent to interpretation. The chapter concludes by emphasising the importance of the final element of legitimate interpretation, which highlights that an interpretation is legitimate if it is congruent with the subjects' own understanding of the values that the particular area of law is designed to advance. This provides the analytical framework within which the use of domestic law in Part II of the thesis is assessed.

I. Law, Legitimacy, and Compliance

It is 'jurisprudential common ground' that one of the primary purposes of law is to affect the behaviour of those to whom the legal norm is directed.[11] Parliament legislates not to arbitrarily exercise its sovereignty, nor does (one hopes) the Prime Minister place legislative bills before the Houses of Parliament solely to antagonise the opposition party. Instead, law is recognised as one of the principal methods by which the actions and interactions of subjects can be modified or constituted. The legal alcohol limit is set because it is expected that the public will be dissuaded from drink driving if a criminal penalty attaches to their actions,[12] just as the prohibition of polygamy aims to institute the Judeo-Christian notion of monogamy throughout the state. So why should we care about legitimacy? This section contends that there is a link between legitimacy and compliance with legal rules. To foster legitimacy encourages voluntary compliance with the legal norm, allowing law to more effectively fulfil the purpose of affecting the behaviour of subjects within the legal system.

i. Legitimacy and Behaviour

Law affects the actions of subjects by factoring into their deliberations, thereby promoting or dissuading a certain action as the 'self-directed social interaction' of the subject. In the words of Gerald Postema, the law 'addresses norms to agents and expects them to guide their actions by those norms. Moreover, it expects those norms to figure in deliberation, not as contextual

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[11] G. Postema, 'Conformity, Custom and Congruence', in M. Kramer *et al* (eds), *The Legacy of H.L.A. Hart* (OUP 2008) 50. See also J. Raz, 'The Rule of Law and its Virtue' in J. Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 214; H. Kelsen, *Law and Peace in International Relations* (Harvard UP 1942) 9; L. Fuller, *The Morality of Law* (Revised edn, Yale UP 1969) 106 (law is 'the enterprise of subjecting human conduct to the governance of rules.') See in the context of international law, U. Fastenrath, 'Relative Normativity in International Law', (1993) 4 EJIL 305, 331 ('law is given the general task of influencing human behaviour').

[12] Indeed, it seems as though such an approach is effective; see A. Killoran *et al., Review of effectiveness of laws limiting blood alcohol concentration levels to reduce alcohol-related road injuries and deaths: Centre for Public Health Excellence* (National Institute of Clinical Excellence 2010).

features setting the environment or parameters of choice, but as *reasons for* deliberative choice.'[13] In a similar vein, Joseph Raz goes a step further, arguing that legal rules provide *exclusionary reasons* for action: conflicting reasons for (in)action are not balanced against the legal rule, but rather are excluded by it.[14]

Conceiving of law as a question of practical reason instead of an Austinian system of authoritative commands backed by state-sanctioned coercion has several benefits, both in the context of the domestic and international law.[15] First, it provides a more accurate representation of the day-to-day functioning of the legal system. Whilst fear of sanction may factor into the reasoning of some would-be offenders, viewing law from the perspective of practical reason allows other considerations that motivate compliance with the legal rule, such as its perceived legitimacy, to be accounted for. Moreover, the importance of sanction as a factor motivating compliance is likely to be diminished as the likelihood of enforcement decreases, suggesting that the functioning of legal norms as reasons for action is particularly pertinent in the context of international law. Second, to conceive of law as authoritative commands does not accurately describe the multifaceted functions that legal rules serve. Laws do not simply prescribe or proscribe actions; they also constitute relationships that otherwise would not exist, such as trustee and beneficiary, employer and employee, and – in the context of international law – state and citizen.[16] Finally, laws are inevitably of a general character and hence subjects must interpret the legal rules in order to apply them to any given context. Without the process of practical reason, and in the absence of infinite authoritative directives that cover every situation, law

[13] G. Postema, 'Implicit Law', (1994) 13 Law and Philosophy 361, 370.
[14] J. Raz, The Authority of Law (OUP 1979) 22–3.
[15] For a more detailed elaboration, see G. Postema, 'Conformity, Custom and Congruence' in M. Kramer (ed), *The Legacy of H.L.A. Hart* (OUP 2008) 54-55.
[16] Postema, 'Conformity, Custom and Congruence', 55.

would not be able to effectively affect the behaviour of those within the society that it purports to govern.[17]

Yet by displacing coercion as the sole reason for compliance with the law, legal philosophers have been left to search for another explanation as to why subjects comply with the law. Some, such as H.L.A. Hart, simply considered compliance as a matter of fact that was required in any valid legal system.[18] Others, such as Hans Kelsen, posited a foundational social norm that endowed every legal rule with normative authority.[19] In recent international law literature, compliance has been linked to the rational self-interest of states,[20] the 'internalization' of international legal norms into the practices of domestic government,[21] or to the social 'acculturation' which causes states to 'adopt the beliefs and behavioural patterns of the surrounding [international] culture.'[22]

It was the 'seeming paradox' of why states comply with 'powerless rules'[23] that prompted Thomas Franck to elaborate a legitimacy-based theory of compliance in an article in the *American Journal of International Law*[24] and in a subsequent monograph building on the same idea.[25] Franck's starting point was that non-coercive factors had to play a role in fostering compliance with legal

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[17] J. Brunée & S. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (OUP 2010) 24.
[18] H.L.A. Hart, *The Concept of Law* (2nd edn, OUP 1994) 116-17.
[19] H. Kelsen, *General Theory of Law and State* (Russell & Russell 1961) 110-11.
[20] J.L. Goldsmith & E.A. Posner, *The Limits of International Law* (OUP 2005). For a rebuttal of Goldsmith & Posner's thesis, see O.A. Hathaway & A.N. Lavinbuk, 'Rationalism and Revisionism in International Law', (2006) 119 Harvard LR 1404. For a survey of theories of compliance in international law, see W. Bradford, 'International Legal Compliance: Surveying the Field' (2005) 36 Georgetown Journal of International Law 495, 496.
[21] H.H. Koh, 'The 1998 Frankel Lecture: Bringing International Law Home', (1998) 35 Houston International Law Journal 623; H.H. Koh, 'Why do Nations Obey International Law? Review of *The New Sovereignty: Compliance with International Regulatory Agreements* by A. Chayes and A. Handler Chayes, and of *Fairness in International Law and Institutions* by T.M. Franck', (1997) 106 Yale LJ 2599; H.H. Koh, '"Transnational Legal Process" - The 1994 Roscoe Pound Lecture', (1996) 75 Nebraska LR 181.
[22] R. Goodman & D. Jinks, 'How to Influence States: Socialization and International Human Rights Law', (2004) 54 Duke LJ 621.
[23] Brunnée & Toope, *Legitimacy and Legality*, 94.
[24] Franck, 'Legitimacy in the International System'.
[25] Franck, *The Power of Legitimacy Among Nations.*

rules in all legal systems, but especially in international law.[26] In particular, he considered that the study of compliance in the international system, in which coercive factors are almost always absent, enables one to isolate the effects of non-coercive elements, which include – drawing on the work of Max Weber and Jürgen Habermas – the perceived legitimacy of the rule.[27] Franck conceived of legitimacy as the character attributable to a rule that had come into being in accordance with the "right process", which he divided into four elements: determinacy, symbolic validation, coherence, and adherence to a normative hierarchy.[28] His main contention was that legitimacy increases the 'compliance pull' of a rule, but is not exclusionary of, nor indefeasible by, other considerations, such as self-interest. Instead, Franck simply claimed that it had explanatory power – it explained why 'many of the rules are obeyed much of the time.'[29]

ii. Legitimacy and Procedural Justice Theory

Whilst Franck's theory might make intuitive sense, working out if and when perceived legitimacy actually has an impact on compliance is not a task that has been broached in general international law. However, empirical studies in other areas of legal scholarship suggest a strong positive link between compliance and perceived legitimacy. At the forefront of this wave is the work of criminologists Tom Tyler and Jon Jackson, who have examined the effect of the perceived legitimacy of legal institutions on subjects' compliance with the law.[30]

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[26] Franck, 'Legitimacy in the International System', 710.
[27] T.M. Franck, 'Why a Quest for Legitimacy?', (1988) U.C. Davis LR 535, 545-46.
[28] Franck, 'Legitimacy in the International System', 711 *et seq.*
[29] Franck, 'Legitimacy in the International System', 710.
[30] The forerunner was Tom Tyler's study of compliance in Chicago; T.R. Tyler, *Why People Obey the Law* (Yale UP 1990).

Tyler and Jackson's work fits within the strand of literature that has been dubbed 'procedural justice theory',[31] which approaches legitimacy from an empirical perspective. This line of scholarship treats legitimacy as 'a quality that is possessed by an authority, law or institution that leads others to feel obligated to accept its directives.'[32] Procedural justice theory posits that if legal authorities – in particular, courts and the police – are neutral and fair in their decision-making, and if they treat people with dignity and respect, the perceived legitimacy of legal institutions is increased. This in turn increases people's deference to the rule of law and preparedness to help the branches of the state involved in law-enforcement.[33]

Tyler's original study examined compliance with the law in Chicago. In order to isolate the reasons for compliance with the law, he separated instrumental (i.e. self-interested) and normative modes of compliance with the law, and divided the latter into compliance due to considerations of personal morality and legitimacy. He found that the perceived legitimacy of institutions was augmented by procedural fairness (fair interpersonal treatment and fair decision-making), and that this played a more dominant role in inducing compliance than either self-interest or personal morality.[34] Further studies conducted in the U.S., Europe and Australia support these conclusions.[35] The key lesson of these studies is 'that fair and legitimate

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[31] Procedural justice theory has its roots in the psychological literature of the 1970's; S.S. Raines, 'Perceptions of Legitimacy and Efficacy in International Environmental Management Standards: The Impact of the Participation Gap', (2003) 3 Global Environmental Politics 47.

[32] Tyler & Jackson, 'Future Challenges in the Study of Legitimacy and Criminal Justice', 88.

[33] M. Hough *et al.,* 'Legitimacy, Trust, and Compliance', 334.

[34] Tyler, *Why People Obey the Law,* 161.

[35] See J. Sunshine & T.R. Tyler, 'The Role of Procedural Justice in Shaping Public Support for Policing', (2003) 37 Law & Society Review 513, 534-35; J. Jackson *et al.,* 'Why Do People Comply With the Law? Legitimacy and the Influence of Legal Institutions', (2012) 52 British Journal of Criminology 1051, 1062-63; T.R. Tyler & J. Jackson, 'Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement', (2014) 20 Psychology, Public Policy and Law 78, 85-87; T.R Tyler & J. Jackson, 'Future Challenges in the Study of Legitimacy and Criminal Justice', in Liebling & Tankebe (eds), *Legitimacy and Criminal Justice,* 84; L. Mazarolle *et al.,* 'Procedural Justice, Routine Encounters and Citizen Perceptions of the Police: Main Findings From the Queensland Community Engagement Trial (QCET)', (2012) 8 Journal of Experimental Criminology 343. Cf. B. Bradford *et al.,*

institutions can encourage people to internalize the moral value that they should obey the law, *simply because it's the law.*'[36]

Throughout the procedural justice literature, the concept of legitimacy is disaggregated into two elements: one that might be termed 'procedural', the other 'substantive.' An institution is considered legitimate if 'first, [the subjects] perceive it to be appropriate, proper, and just; and, second, that when they believe that it is appropriate, proper, and just, they also believe that they have the normatively grounded obligation to obey the rules and directives that emanate from it.'[37] The procedural element of legitimacy centres on the trust and confidence that is placed in institutions as a result of fair decision making (for example, that people trust the police to be neutral and transparent) and fair interpersonal treatment,[38] which studies have demonstrated

> [G]enerate the belief that authorities have the right to define appropriate behaviour; encourage the perception that authorities are justified in expecting feelings of responsibility and obligation from citizens; and strengthen identification with the goals, motives, and moral purpose of legal authorities.[39]

In some studies, the procedural element is also operationalized by questions regarding the 'normative alignment' of the subject with institutions; in other words, the belief that institutions act in accordance with normative standards of conduct in society, which fosters shared values

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'Obeying the Rules of the Road: Procedural Justice, Social Identity, and Normative Compliance', (2015) 31 Journal of Contemporary Criminal Justice 171, 184.

[36] J. Jackson, 'On the Dual Motivational Force of Legitimate Authority', in B.H. Bornstein & A.J. Tomkins (eds), *Motivating Cooperation and Compliance with Authority: The Role of Institutional Trust* (Springer 2015) 148.

[37] J. Jackson *et al.,* 'Truly Free Consent? On the Nature of the Duty to Obey', Criminal Justice and Behaviour (forthcoming), p. 3 in draft.

[38] Jackson *et al.,* 'Truly Free Consent?', 3. Examples of questions designed to measure trust and confidence are 'You generally support how the police act in your community' and 'When judges make decisions they almost always behave according to the law'; Tyler & Jackson, 'Popular Legitimacy and the Exercise of Legal Authority', 84.

[39] Tyler & Jackson, 'Future Challenges in the Study of Legitimacy and Criminal Justice', 88.

and interests.[40] The 'goals of the authorities [then] become the goals of the individual through the mechanism of community identification.'[41]

The substantive element of legitimacy in these studies is the perceived obligation to obey law or the legal authority, based on acknowledgement that the institution is the 'rightful holder' of authority in society.[42] As Jackson notes, the 'duty to obey echoes the Weberian insight that power is transformed into authority when it is seen to be legitimate. If one recognises the authority of the police, one will defer to their orders out of a sense of moral obligation rather than fear of punishment or anticipation of reward.'[43]

In a 2014 paper, Tyler and Jackson disaggregated legitimacy into three elements – duty to obey, trust and confidence, and normative alignment – and tested the effects of these elements on law-related behaviour in a U.S. wide study of 1603 participants. Their conclusions support previous studies that demonstrate a robust link between perceived legitimacy of the police and voluntary adherence to the law.[44] Interestingly, they found that different elements of legitimacy had distinct effects on different law-related behaviours: compliance with the law was fostered by an increased sense of obligation, and trust and confidence in the police; cooperation with law-enforcement authorities (such as giving evidence in court) was affected by obligation, trust and confidence,

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[40] Tyler & Jackson, 'Popular Legitimacy and the Exercise of Legal Authority', 79. This builds on A. Bottoms & J. Tankebe, 'Beyond Procedural Justice: A Dialogical Approach to Legitimacy in Criminal Justice', (2012) 102 Journal of Criminal Law & Criminology 119. An example of a question designed to measure normative alignment is 'Your own feelings about right and wrong usually agree with the laws that are enforced by the Police.'; Tyler & Jackson, 'Popular Legitimacy and the Exercise of Legal Authority', 84.

[41] Tyler & Jackson, 'Popular Legitimacy and the Exercise of Legal Authority', 79.

[42] Tyler & Jackson, 'Future Challenges in the Study of Legitimacy and Criminal Justice', 88. Examples of survey questions designed to measure duty to obey is 'All laws should be strictly obeyed' and 'You should support decisions made by judges even when you disagree with them.'; Tyler & Jackson, 'Popular Legitimacy and the Exercise of Legal Authority', 83.

[43] Jackson *et al.,* 'Truly Free Consent?', 3.

[44] Tyler & Jackson, 'Popular Legitimacy and the Exercise of Legal Authority', 85.

but also by perceived normative alignment; whilst proactive community engagement by the police was facilitated by perceived normative alignment.[45]

An international lawyer can draw three lessons from the criminological work on procedural justice theory. First, it provides support for Franck's contention that there is a link between perceived legitimacy and compliance. Of course, one must be cautious in drawing conclusions from work conducted in the domestic sphere, and in the particular context of criminal law. This does not provide irrefutable evidence linking perceived legitimacy to compliance in international law nor does it establish that the procedural justice performed by one institution is the mechanism by which legitimacy may be augmented on the international level. Clearly, the work of Tyler and Jackson focussed on how police practices might be ameliorated in order to affect law-related behaviour, and this dictated the focus of their studies.

However, the empirical analyses demonstrate the more general proposition, advanced in theoretical argument by Franck, that legitimacy fosters voluntary compliance.[46] The daily life of international law is constituted by the actions of individuals – states as abstract entities cannot act by themselves. Instead, it is a government advisor that authorises the use of force, a trade minister that has the final say whether an action in launched under the WTO Dispute Settlement Mechanism, and a soldier that decides whether to torture a prisoner of war. It would be strange to think that individuals treated institutions that they perceive as legitimate in one way on the domestic plane and completely disregard legitimacy on the international plane.[47] To borrow the

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[45] Tyler & Jackson, 'Popular Legitimacy and the Exercise of Legal Authority', 86.

[46] Similarly, see I. Hurd, 'Legitimacy and Authority in International Politics', (1999) 53 International Organization 379, 379-80.

[47] Cf Franck, 'Why a Quest for Legitimacy?', 542 (stating that 'Deployed by students of the national community, legitimacy is used to postulate what, other than a command and its enforcement, is required to create a propensity

words of Vaughan Lowe, 'Brains are brains.'[48] Of course, it could be argued that the actions of a state in international relations are dictated by an agglomeration of individuals' views and interests, channelled through pressure groups and industry lobbyists to those who govern. However, without claiming that the conclusions of these studies are directly transposable to international law, it is justifiable to say that this empirical work lends support to the claim that legitimacy at least has some degree of 'compliance-pull'.

Second, the criminological literature highlights that the concept of legitimacy can be disaggregated. Rarely in international law has it been questioned how these elements interact or how they might have differential effects on distinct law-related behaviour. For example, might a deficiency in substantive legitimacy be remedied by procedural legitimacy?[49] Is 'normative alignment' more important in certain contexts than in others? At the heart of this is the question of whether the legitimacy is context dependent, a question that will be examined in Section II below.

Third, the empirical works remind us that legitimacy is constructed and maintained through a continuous process of interaction between law institutions and the governed. Subjects alter their perceptions of the legitimacy of institutions in light of past interactions and approach current relations accordingly. What is judged to be legitimate cannot be viewed as a moment frozen in time, but rather must be assessed in light of the historic and continuing relations of the parties involved. In the words of Anthony Bottoms and Justice Tankebe, 'legitimacy should not be

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among the citizens to obey generally the rulers and the rules. The internationalist ought to feel comfortable with, and stimulated by, this notion of legitimacy as a non-coercive factor predisposing towards obedience').

[48] V. Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', in M. Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2001) 221.

[49] Cf. K. Bäckstrand, 'Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development', (2006) 12 European Journal of International Relations 467, 472 *et seq.*

viewed as a single transaction; it is more like a perpetual discussion, in which the content of the power-holders later claims will be affected by the nature of the audience response.'[50] Some international lawyers have acknowledged the dialogic nature of legitimacy;[51] all too often, however, legitimacy is approached as if it were a 'laundry list' that, if fulfilled, entitles the institution or law to the title of 'legitimate'.[52]

One might contend that this dynamic approach blurs empirical and normative conceptions of legitimacy.[53] The empirical conception necessarily must view legitimacy as an iterative process of claim and response in order to fully comprehend its functioning, whilst the normative conception may be in the form of a checklist, designed to instantiate the normative values that the compiler thinks fit. Indeed, it might be justifiable to approach legitimacy from a 'checklist' perspective if the author wants to assess the legitimacy from a purely external viewpoint, judging whether certain laws or institutions are legitimate or not according to his or her criteria. But this is hardly ever the case. Those that examine legitimacy do so because they see its importance in practice and feel that, by elucidating and illuminating the concept, they can help institutions or laws evolve towards greater legitimacy. Franck puts the matter aptly when he says that 'If legitimacy can be studied, it can also be deliberately nourished. There lies the practical rationale of this enquiry.'[54] If authors want to fulfil this goal, then an understanding of the processes by which legitimacy is created and maintained is a necessary prerequisite.

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[50] Bottoms & Tankebe, 'Beyond Procedural Justice', 129.

[51] Notably, Brunnée & Toope, *Legitimacy and Legality in International Law*.

[52] Cf. J. Waldron, 'The Rule of Law and the Importance of Procedure', NYU Law Public Law & Legal Theory Research Paper Series No. 10-73, 3 (describing approaches to the rule of law as 'laundry lists of demands').

[53] The distinction between empirical (social) and normative conceptions of legitimacy is drawn by Chris Thomas; Thomas, 'Uses and Abuses of Legitimacy', 741.

[54] Franck, 'Legitimacy in the International System', 711. See also Franck, 'Why a Quest for Legitimacy?', 546-47.

This section has argued that one of the purposes of law – affecting the behaviour of those that it purports to govern – is more likely to be successfully fulfilled if the authority, law, or institution is perceived to be legitimate. However, whilst this empirical link demonstrates the importance of legitimacy as a concept, it does not directly translate to a normative conception of legitimacy. The following section will defend a tri-partite conception of legitimacy based on the empirical work cited above, arguing that legitimacy should be conceived of as deference based on rightful interpretive authority, procedural justice, and normative alignment.

II. LEGITIMATE INTERPRETATION

In the past 25 years, there has been a 'veritable renaissance of international legitimacy talk.'[55] It has been used as an analytical hand glass though which scholars and practitioners have assessed the pedigree of international organisations,[56] courts and tribunals,[57] and of international law itself.[58] But the concept has all-too-frequently been ill defined, rolled out to obfuscate the subjective preferences and values of those that invoke it in a cloak of 'legitimacy-speak.'[59] If approached with precision, however, the concept promises to be a useful tool within which to evaluate interpretation.

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[55] I. Clark, *Legitimacy in International Society* (OUP 2005) 12.

[56] See for example, A. Follesdal & S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', (2006) 44 Journal of Common Market Studies 533; A. Buchanan & R. Keohane, 'The Legitimacy of Global Governance Institutions', in R. Wolfrum & V. Röben (eds), *Legitimacy in International Law* (Springer 2008); A. Pellet, 'Legitimacy of Legislative and Executive Actions of International Institutions', in Wolfrum & Röben (eds), *Legitimacy in International Law*; A. D'Amato, 'On the Legitimacy of International Institutions', in Wolfrum & Röben (eds), *Legitimacy in International Law*; C. Gray, 'A Crisis of Legitimacy for the UN Collective Security System', (2007) 56 ICLQ 157; Elsig, 'The World Trade Organization's Legitimacy Crisis'; D. Caron, 'Legitimacy of Collective Authority of the Security Council', (1993) 87 AJIL 552.

[57] See for example, A. von Bogdandy & I. Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (OUP 2014) 156-206; T. Treves, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals', in Wolfrum & Röben (eds), *Legitimacy in International Law*.

[58] See for example, J.H.H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', (2004) 64 ZaöRV 547; and more generally H. Charlesworth & J.-M. Coicaud (eds), *Fault Lines of International Legitimacy* (CUP 2009); L.H. Meyer (ed), *Legitimacy, Justice and Public International Law* (CUP 2009).

[59] Crawford, 'The Problems of Legitimacy-Speak'.

Academic work on legitimacy has invariably centred on the character of legal rules (Franck), institutions (Tyler & Jackson), or global governance regimes (Kingsbury *et al.*).[60] Legitimate interpretation is different, straddling the gap between the legitimacy of the interpreting institution and the legitimacy of the interpreted rule as applied. As such, a novel theoretical framework is elaborated in this section which takes account of both procedural and substantive aspects of legitimate interpretation.[61] Does the shift of focus to interpretation call for a different approach? What creates – if anything – the particularly distinctive characteristic of legitimate interpretation, as opposed to legitimate law?

This exercise is not for want of conceptions of (non-interpretive) legitimacy advanced on the international plane. Amongst the myriad theories proffered, Tom Franck's process theory,[62] Mattias Kumm's constitutionalist theory,[63] and the neo-Fullerian theory of Jutta Brunnée and Stephen Toope are particularly worthy of note.[64] Space precludes a comprehensive survey of the theories of legitimacy that have been expounded by international lawyers, however this section will draw on the work of previous authors where appropriate.[65]

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[60] B. Kingsbury, N. Krisch, & R.B. Stewart, 'The Emergence of Global Administrative Law', (2005) 68 Law & Contemporary Problems 15, 37-41. See also A. Buchanan & R.O. Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 Ethics & International Affairs 405.

[61] The conception of legitimate interpretation outlined below focusses on courts and tribunals as the entity effecting the interpretation. However with slight modifications, this concept could be used to analyse interpretations carried out by other bodies.

[62] See Franck, *The Power of Legitimacy Among Nations*; T.M. Franck, *Fairness in International Law and Institutions* (OUP 1998); Franck, 'Why a Quest for Legitimacy?'; Franck, 'Legitimacy in the International System'.

[63] M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', (2004) 15 EJIL 907.

[64] Brunnée & Toope, *Legitimacy and Legality in International Law*.

[65] For overviews of the international legal literature on legitimacy, see Bodansky, 'Legitimacy in International Law and International Relations'; Thomas, 'The Uses and Abuses of Legitimacy in International Law'. Thomas divides theories of legitimacy into three categories: legal legitimacy (equivalent to legal validity); moral legitimacy (all theories of legitimacy that adopt a normative framework other than law); and social legitimacy (empirical legitimacy; in other words, what the subjects of the system believe to be legitimate).

The ideal framework within which to assess interpretive legitimacy would be based on an empirical survey of what legal subjects believe to be a legitimate interpretation. However, such empirical work is thin on the ground.[66] Instead, 'most studies assume that normative standards of legitimacy, such as transparency, participation, and representativeness, are, in fact, widely shared'.[67] This section aims to avoid such assumptions by proceeding from the tripartite division formulated in the empirical criminological literature – itself building on the work of social theorists and IR scholars[68] – to argue that three distinct elements of legitimacy have separate normative underpinnings. This definition will form the framework within which the uses of domestic law in Part II of the thesis are assessed.

i. Interpretive Authority

The first element of legitimate interpretation is the acknowledgement that there is a duty to obey the court or tribunal on a question of interpretation.[69] This stems from the link between legitimacy and an institution's authority, which simultaneously justifies both the court's power and obedience of its subjects.[70] Why might states or individuals feel a duty to obey a particular interpretation handed down by a court or tribunal?

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[66] D. Bodansky, 'Legitimacy in International Law and International Relations', in J.L. Dunoff & M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 323.

[67] Bodansky, 'Legitimacy in International Law and International Relations', 323.

[68] Especially D. Beetham, *The Legitimation of Power* (2nd edn, Palgrave 2013); J.-M. Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (tr. D. Ames Curtis, CUP 2002).

[69] Here I use authority to refer to 'the right to command or give an ultimate decision'; D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', (1999) 93 AJIL 596, fn 28. Cf. J. Raz, *The Morality of Freedom* (OUP 1988) 46.

[70] Coicaud, *Legitimacy and Politics*, 10. See also D. Beetham, 'Political Legitimacy', in K. Nash & A. Scott (eds), *The Blackwell Companion to Political Sociology* (Blackwell 2004) 107 ('Since the dawn of human history, those occupying positions of power, and especially political power, have sought to ground their authority in a principle of legitimacy, which shows why their access to, and exercise of, power is rightful, and why those subject to it have a corresponding duty to obey.')

The answer to this reverts to the question of what creates a moral obligation to obey an institution.[71] In both domestic and international law, the role of consent looms large.[72] Jean-Marc Coicaud astutely analyses the place of consent in legitimacy and the generation of the duty to obey in the following way:

> [T]he feeling that we have a right *vis-à-vis* an individual signifies that we recognise his right – which presupposes, in turn, that the individual also credits us with having our right ... In organising an ongoing relationship among individuals, right creates reciprocal expectations that the consent of each allows to be satisfied.[73]

The very concept of rights, then, presupposes that we consent to have our actions limited by mutually recognising each other's rights. Just as rights on the individual level presuppose consent, recognition of a political institution's right to govern presumes consent by those who recognise the institutional right.[74] This in turn leads to the duty to obey: 'To consent is to accept a situation that includes a measure of renunciation, which is manifested in the duty to obey.'[75]

In liberal democracies, the duty to obey courts is a corollary of the consent that is given to the governmental institutions of the state. Recognising that the state has a right to govern includes the recognition of legal institutions whose purpose it is to settle disputes over the rights and duties of subjects in the state. In international law, however, the question is more difficult.

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[71] Note that the duty to obey a *legal* institution cannot itself ultimately be founded on a *legal* obligation – to contend this would be circular.

[72] Consent is certainly not the sole justification advanced for the exercise of political authority –for a diagrammatic representation of normative justifications advanced in the twentieth century, see Beetham, 'Political Legitimacy', 112.

[73] Coicaud, *Legitimacy and Politics*, 11.

[74] This is by no means a new idea, most obviously harking back to the work of Hobbes and Rousseau. However, the work of Coicaud is particularly interesting in that it examines the role of consent in the context of legitimacy.

[75] Coicaud, *Legitimacy and Politics,* 13.

As in domestic law, the question of the right to govern has traditionally been viewed as reliant on consent, even if the justificatory weight of state consent in relation to law formation is generally on the wane.[76] In the context of international dispute settlement, consent creates a duty to obey a decision of a court in three different ways. First, states can consent to the jurisdiction of a court to settle a particular dispute, such as a *compromis* for inter-state arbitration. Such consent recognises the right of the court or tribunal to authoritatively adjudicate that particular dispute, which creates a corollary duty to obey the judgment of the court.

Second, states may consent to the legal regime of which the court or tribunal forms part.[77] A good example of this is the consent of WTO members to the compulsory and binding jurisdiction of the Dispute Settlement Mechanism. In this case, consent to the regime entails acceptance of the secondary rules about how law is created, interpreted, changed, and applied.[78] The duty to obey the judicial institutions that form part of the regime is created by recognition of the regime's right to govern within its particular field.[79] If the duty to obey a court is formed on the basis of consent to a legal regime, judgments of the court must accord with the secondary rules of the regime, for it 'is what connects an institution's continuing authority to its original

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[76] See for example, M.L. Lister, 'The Legitimating Role of Consent in International Law', (2010) 11 Chicago Journal of International Law 663; N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', (2014) 108 AJIL 1, 2-3. Cf. A. Buchanan & R.O. Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 Ethics & International Affairs 405, 413. See also, Bodansky, 'Legitimacy in International Law and International Relations', 330; Kumm, 'The Legitimacy of International Law', 914.

[77] For a similar idea, see Bodansky's division between specific consent to primary rules and general consent to an 'ongoing system of governance ... which creates institutions with quasi-legislative and adjudicatory authority'; Bodansky, 'The Legitimacy of International Governance', 604.

[78] Bodansky, 'The Legitimacy of International Governance', fn 45. Cf. H.L.A. Hart, *The Concept of Law* (2nd ed, OUP 1994) 79-81.

[79] I adopt Krasner's definition of 'regime', which he defines as a system of 'implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.' Examples are the international trade regime of the WTO and the regime of the ECHR; S.D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', *in* S.D. Krasner, *International Regimes* (Cornell UP 1983) 2.

basis in state consent.'[80] Moreover, consent to a regime must be viewed 'as a process, as a relationship ... that must be constantly renewed and maintained.'[81] Third, in instances where a natural or legal person brings a claim before an international court or tribunal – for example, before the European Court of Human Rights or an arbitral tribunal constituted under a bilateral investment treaty – it is presumed that that person consents to the adjudication of the dispute and is hence bound by the corollary moral duty to obey its decision.[82]

It might be questioned whether duty to obey is coextensive with the jurisdiction of a court, the latter normally also having consent as its basis. Although the two concepts largely mirror each other, there are points at which they diverge and hence should be kept separate. Take, for example, international criminal courts. These courts purport to exercise authority over individuals that have generally not consented to their jurisdiction. Nevertheless, they claim a duty to obey on the basis of other normative justifications for their authority; namely, considerations of substantive justice.[83] Conflating the concepts of consent and the duty to obey would stop us from examining other justifications of authority offered, which must be judged in their context and on their own merits.[84]

The duty to obey the decision of an international court or tribunal may largely be justified on the basis of the consent of those to whom the judgment is directly addressed. However, consent –

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[80] Bodansky, 'The Legitimacy of International Governance', 605.
[81] P.H. Partridge, *Consent and Consensus* (Praeger 1971) 29.
[82] Cf. Bodansky, 'The Legitimacy of International Governance', 610-11.
[83] See in particular D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 579 *et seq*; A. Cassese, 'The Legitimacy of International Criminal Tribunals', (2012) 25 Leiden Journal of International Law 491 (distinguishing between consent, purposive, performative and universal values legitimacy).
[84] Weber, *Economy and Society,* 213 ('According to the kind of legitimacy which is claimed, the type of obedience, the kind of administrative staff developed to guarantee it, will all differ fundamentally.') See also M. Hlavac, 'A Developmental Approach to the Legitimacy of Global Governance Institutions', in D.A. Reidy & W.J. Riker (eds), *Coercion and the State* (Springer 2008) 210.

or, indeed, the duty to obey, whatever its normative foundations – is a necessary but not a sufficient condition for an interpretation to be considered legitimate. The decision must also accord with the minimum requirements of procedural justice.

ii. Procedural Justice

Procedural justice is the element of legitimacy that most specifically pertains to interpretations by judicial or arbitral institutions. Tyler and Jackson distinguish four elements of procedural justice, of which the first two are particularly pertinent for our enquiry: first, people want to have an opportunity to tell their side of the story, whether to the police or before a court; second, institutions should be neutral, basing their decisions on consistently applied legal principles and evidence; third, people should be treated with respect; finally, institutions should behave as if 'they are sincerely trying to do what is best for the people with whom they are dealing.'[85]

Whilst the final two elements reflect the importance of interpersonal treatment as a factor of legitimacy, the first two elements instantiate what might be called the procedural elements of the rule of law. Academic discussion of the rule of law often neglects the centrality of law-enforcement institutions to the operation of the law, focussing instead on substantive (such as what the law must prohibit) or formal elements (such as generality and prospectiveness of laws).[86] The eight criteria of the inner morality of law elaborated by Lon Fuller, for example, focus almost solely on the formal, and not procedural, aspects of law making.[87] Considering the focus of this thesis on the actions of judicial and arbitral bodies, the import of the procedural

[85] Tyler & Jackson, 'Popular Legitimacy', 81-82.

[86] J. Waldron, 'The Rule of Law and the Importance of Procedure', NYU School of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 10-73.

[87] Waldron, 'The Rule of Law', 6-8. Cf. J. Finnis, 'Natural Law Theories', *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), E.N. Zalta (ed), <http://plato.stanford.edu/archives/fall2014/entries/natural-law-theories/> (referring to Fuller's theory as a 'merely procedural natural law theory').

elements of legitimacy should not be underestimated. Jeremy Waldron has elaborated a useful list of procedural characteristics that he considers fundamental to the rule of law:

> A. a hearing by an impartial tribunal that is required to act on the basis of evidence and argument presented formally before it in relation to legal norms that govern the imposition of penalty, stigma, loss etc.;
>
> B. a legally-trained judicial officer, whose independence of other agencies of government is assured;
>
> C. a right to representation by counsel and to the time and opportunity required to prepare a case;
>
> D. a right to be present at all critical stages of the proceeding;
>
> E. a right to confront witnesses against the detainee;
>
> F. a right to an assurance that the evidence presented by the government has been gathered in a properly supervised way;
>
> G. a right to present evidence in [sic] one's own behalf;
>
> H. a right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case;
>
> I. a right to hear reasons from the tribunal when it reaches its decision which are responsive to the evidence and arguments presented before it; and

J. some right of appeal to a higher tribunal of a similar character.[88]

Waldron here had domestic legal systems in mind; however, all but the last criteria have direct application on the international plane. The point is simple: if a court or tribunal falls foul of the requirements of neutrality and transparency elaborated above, the addressees of the interpretive decision will be less likely to voluntarily comply with it. They will consider the court to be a handmaiden of the rich and powerful, or a forum in which the personal biases of judges are given weight. Whatever the rationale, it is likely that the duty to obey the court will be impacted by its procedural failings. International courts and tribunals, which are under the spotlight of the international community and the world's media, seem less likely to fall foul of these procedural strictures than many domestic courts.[89] However, the final element of legitimacy – shared values – plays a significantly larger role in the analysis conducted in Part II.

iii. Shared Values

In the 2014 study of Tyler and Jackson, the third element of legitimacy is normative alignment, defined as the belief that institutions act in accordance with normative standards of conduct in society, which fosters shared values and interests.[90] This idea is not alien in international law: the 'interactional' theory of international law of Jutta Brunnée and Stephen Toope highlights that normative alignment, or – in their terminology – 'shared understandings', is pivotal for the functioning of law. This section will examine this claim, tracing its origins to the jurisprudence of Lon Fuller. It argues that Brunnée and Toope's theory fundamentally differs from Fuller's, but nevertheless both highlight an important and indelible aspect of legitimate interpretation.

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[88] Waldron, 'The Rule of Law', 4. See also Report of the UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 (3 August 2004), para 6.

[89] Clearly this is not true for all courts - the media on the U.S. Supreme Court, for example, far exceeds the attention paid to any international court.

[90] Tyler & Jackson, 'Popular Legitimacy and the Exercise of Legal Authority', 79.

A. Brunnée and Toope's Interactional Theory of International Law

The genesis of the interactional theory of Brunnée and Toope is Lon Fuller's classic work, *The Morality of Law*. For Fuller, a legal system does not simply create positive law but rather must to some extent fulfil eight criteria of legality, termed the 'inner morality of law' (such as the generality, promulgation, and non-retroactivity of laws). Brunnée and Toope adopt Fuller's eight criteria as the basis for their interactional theory of law, claiming that 'adherence to the eight criteria of legality (a 'practice of legality') produces law that is legitimate in the eyes of the persons to whom it is addressed.'[91] This 'legal legitimacy' produces a feeling of *legal* obligation, and it is this sense of obligation that is the 'value added', and the identifying characteristic, of law.[92] Thus, declared laws that fall foul of any of the eight criteria do not command voluntary compliance through felt obligation, and hence do not function as 'law'.

Of Fuller's eight criteria of legality, Brunnée and Toope place a great deal of importance on the final criterion, 'congruence'.[93] For Fuller, this criterion refers to congruence between official actions (including the police, courts, and government officials) and the law 'as declared'.[94] However, for Brunnée and Toope, the transposition of this criterion to the international level alters its character: no longer is it congruence between official actions and law, but rather 'in the case of international law, [it is] congruence amongst the actions of a majority of international actors.'[95]

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[91] Brunnée & Toope, *Legality and Legitimacy,* 27.
[92] Brunnée & Toope, *Legality and Legitimacy*, 37.
[93] See N. Krisch, 'Review of Jutta Brunnée and Stephen Toope, *Legality and Legitimacy in International Law: An Interactional Account*', (2012) 106 AJIL 203, 204.
[94] Fuller, *The Morality of Law*, 81-91.
[95] Brunnée & Toope, *Legality and Legitimacy*, 35.

As Nico Krisch rightly points out, Brunnée and Toope's reformulated criterion of congruence 'reflects and operationalizes the [authors'] emphasis on shared understandings as a basis of international normativity'.[96] At a basic level, these shared understandings constitute the informal social practices necessary for law to be intelligible, such as linguistic conventions. However, Brunnée and Toope claim that the importance of shared understandings goes further than this: actors within the international legal system also share the understanding that norms meeting the criteria of legality engender legal obligation, as well as sharing more 'rich and substantive' understandings regarding certain values that law must protect, such as the right to property.[97] In their view, international law is dependant upon 'a background of shared understandings that make it intelligible, *and* upon broad congruence with the patterns and practices in international society.'[98] The authors work on the assumption that these patterns and practices reflect substantive shared understandings of states.[99] To illustrate this point, they provide the example of the Migrant Workers Convention as a 'law-making project' that is 'markedly at odds with – or ahead of – social background understandings' resulting in a low number of ratifications.[100] Whilst deep, substantive shared values within a 'community of practice' are not necessary, if present, they cannot be transgressed.[101]

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[96] Krisch, 'Review of Jutta Brunnée and Stephen Toope', 206.

[97] Brunnée & Toope, *Legality and Legitimacy*, 68-69.

[98] Brunnée & Toope, *Legality and Legitimacy*, 75 (emphasis added). Note that in other parts of their book, the authors seem to endorse Emanuel Adler's statement that members of a community of practice must share an understanding of 'what they are doing and why'. However, it is unclear whether the authors consider shared understandings regarding the purpose of law to be a pre-requisite; *ibid*, 80.

[99] This transposal of values to practices is not something that is fleshed out in Brunnée and Toope's work, leaving one to wonder if one really can induce the values of a state from its practice. An analogous issue is induction of *opinio juris* from state practice for the purposes of elucidating a rule of custom; see for example *North Sea Continental Shelf (F.R.G. v Denmark; F.R.G. v The Netherlands)* (Judgment) [1969] ICJ Rep 3, 44, para 76.

[100] Brunnée & Toope, *Legality and Legitimacy,* 76.

[101] Brunnée & Toope, *Legality and Legitimacy,* 86-87.

This reformulation of the congruence criterion has drawn criticism. According to Krisch, 'the analogy here [between Fuller's and Brunnée and Toope's congruence criterion] is fragile at best, and this fragility may explain why the criterion of congruence proves particularly problematic most of the case studies in the book.'[102] As should be immediately apparent, by basing legal normativity on the practice of states, the authors run the risk of taking an 'apologetic' stance with regards to the legality of state actions – if enough states act in an illegal way then it ceases to be illegal. Such a statement is unexceptional in the context of customary international law; however, the authors also contend that treaty law and even *jus cogens* norms cannot be incongruent with the 'patterns and practices in international society'. Indeed, this forms the basis of Brunnée and Toope's striking conclusion that the prohibition on torture does not form part of international law.[103]

It is neither clear why shared understandings must be shoehorned into the criteria of congruence in quite the way that Brunnée and Toope do, nor is it evident that recourse must be had to constructivist IR literature to argue that shared understandings are important. In order to examine Brunnée and Toope's claim that congruence with the shared values of a community is a pre-requisite for law, it is instructive to trace the idea back to its Fullerian origins.

B. Fuller's Vertical Integration and Congruence Theses

The most convincing analysis of this element of Fuller's jurisprudence has been conducted by Gerald Postema, who elucidates why and in what respects shared understandings are pivotal to the functioning of the law.[104] To do this, Postema distinguishes between the 'vertical interaction' thesis and the 'congruence' thesis, both of which are advanced in Fuller's work. These theses are

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[102] Krisch, 'Review of Jutta Brunnée and Stephen Toope', 206.
[103] Brunnée & Toope, *Legality and Legitimacy,* 269.
[104] Postema, 'Implicit Law'. See also Postema, 'Conformity, Custom and Congruence'.

predicated on two crucial points: first, that law provides citizens with reasons to act a certain way which factor into their deliberations; and second that the practical import of a norm can only be understood in relation to others in society.

With regard to the first element, this 'self-directed action' is the mechanism by which law fulfils its function, as noted earlier in this chapter. However, laws seek to 'influence deliberation in a wholesale fashion, not through detailed step-by-step instructions, but through general norms that agents must interpret and apply to their specific practical situations.'[105] As a result, an individual faced with a law must work out the practical import of a norm in order for it to factor into his or her deliberation.[106] This leads to the second point: for an individual to discern the practical import of a norm, they must be reasonably certain that they can predict how others will interpret and act in relation to the norm. Driving on the left-hand side of the road, for example, rests on a presumption that other road users understand the concepts of right and left in the same way as us. As a result, the practical import of a norm must be 'publicly accessible' and not subjectively imputed to the law by each individual.

The vertical interaction thesis pertains to the publicly accessible nature of the practical import of laws and the interaction of state and citizen.[107] In the words of Postema, this thesis entails that:

> [The] law-givers must shape the rules they enact or interpret in anticipation of how citizens are likely to understand, the language they use, and the decisions they make. Likewise,

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[105] Postema, 'Implicit Law', 370.

[106] As Postema notes, the practical import of a norm in turn depends on 'a capacity to work out the correct applications of the norm and a capacity to appreciate the reason for acting in the way indicated and to relate it in an appropriate way to other reasons the agent might have'; Postema, 'Implicit Law', 370.

[107] Postema, 'Implicit Law', 368-72; Postema, 'Conformity, Custom and Congruence', 58.

> citizens will understand announced rules and decisions in light of how they expect officials and their fellow citizens to understand and apply the rules.[108]

It is hence in the vertical interaction thesis that Fuller's eighth criterion of congruence between official actions and declared law finds its place, forming a crucial part of the 'relatively stable reciprocity of expectations between the law-giver and subject.'[109]

Postema also identifies a second, 'more robust' claim regarding informal social practices in Fuller's work – and one that accords more readily with some elements of the theory of Brunnée and Toope – termed the 'congruence thesis'. According to the congruence thesis, a legal system cannot function if it is sealed off from background social practices.[110] That is not to say that laws can never diverge from social norms, but rather that they cannot be 'systematically at odds or radically isolated from ordinary, informal social practices and conventions.'[111] An example of Nigel Simmonds' neatly illustrates this: consider a sign stating 'Dogs must be carried on the escalator'.[112] We understand this injunction because we know something about the nature of dogs (they have small feet), escalators (they are powerful machines), and can understand the likely concerns of people regarding the interaction of the two. We do not read the sign as obliging us to find multiple canines in order to be able to use the escalator, nor that, should we intend to carry a dog, we must do so on an escalator.[113]

The steps in the argument for congruence thesis are straightforward but carry profound implications. First, if laws are broadly congruent with the underlying social practices, then their

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[108] Postema, 'Implicit Law', 372.
[109] Fuller, *The Morality of Law*, 209.
[110] Postema, 'Conformity, Custom and Congruence', 58-60.
[111] Postema, 'Implicit Law', 374. For a critique of the traditional Lewisian approach to conventionality, see A. Marmor, *Social Conventions: From Language to Law* (Princeton UP 2014).
[112] N.E. Simmonds, 'Between Positivism and Idealism', (1991) 50 CLJ 308, 311-14.
[113] See also, P. Schlag, 'No Vehicles in the Park', (1999) 23 Seattle University LR 381, 387.

practical import is publicly accessible. Without these practices, however, one must rely on the text of the law to convey its meaning, and either on fear of sanction, deference to the authority of the law-giver, or the 'reasonableness' of the law to give the 'reason-giving' force of the law. However, Fuller rejects outright the idea that the text of a law can determine meaning for the purposes of self-directed action without relying on social conventions. To illustrate, take his (now) well-worn example of a law prohibiting of vehicles in a park: a 'vehicle' can only be understood in the context in which it is used, which enables one to discern the practical import of the law. We 'know that there is no need to worry about the difference between Fords and Cadillacs ... [but what] if some local patriots wanted to mount on a pedestal a truck used in World War II'?[114] It is the understanding that the law is aimed at preserving peace and quiet or preventing injury that leads one to the conclusion that automobiles are banned, not any meaning inherent in the word 'vehicle.'

As a result of the inherent indeterminacy of text and absent any link to informal social practices, the individual cannot determine what the law requires, hence precluding consideration of the 'reason-giving' force of the norm: 'Practical force supplied by sanction or authority or some other external source may adequately motivate compliance with norms once it is publicly clear what complying with them consists in, but they cannot help in determining the public content of those norms.'[115] Informal social practices are hence publicly accessible pools of information from which individuals collectively draw to discern the practical import of norms and alter their

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[114] L.L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', (1958) 71 Harvard LR 630, 663. This was a counter-example to Hart's proposition that a law prohibiting vehicles in a park would 'plainly' apply to automobiles; H.L.A. Hart, 'Positivism and the Separation of Law and Morals', (1958) 71 Harvard LR 593, 607. Fuller's characterization of Hart's position might be unfair considering the debt Hart owed to the Ordinary Language School of philosophy, which based the meaning of words in practice. The argument here would be that Hart's 'core' meanings referred rather to the 'core' usages of the word vehicle within society, rather than the meanings intrinsic to the word itself. See A. Marmor, *Interpretation and Legal Theory* (2nd ed Hart 2005) 100-101; A Lefebvre, 'Hart, Wittgenstein, Jurisprudence', (2011) 154 Telos 99, 100.

[115] Postema, 'Implicit Law', 376.

behaviour accordingly. If divorced from these norms, the mechanism by which law functions – its ability to factor into citizens' self-directed action – is substantially undermined.

Understood thus, the congruence theses of Fuller and Brunnée and Toope function on fundamentally different levels. On the one hand, Fuller's thesis is based on the idea that law cannot be hermetically sealed from social practices because to do so would render it unintelligible. The thesis of Brunnée and Toope, on the other hand, goes much further: as noted above, they argue that divergence of the law from 'rich, substantive' shared values, such as abhorrence of the death penalty, would result in the decay or desuetude of the law.[116] Yet whilst framing this contention in terms of Fullerian congruence, it seems as though the rationale for such a claim must come from elsewhere.[117] If the death penalty is enacted in a society that is unanimous in its condemnation of such a penalty, the lack of congruence is not a question of intelligibility but rather of fundamental values. In reality, the authors' requirement of congruence appends a new criterion of legality onto Fuller's criteria, yet we are left without a sufficiently robust explanation for why congruence commands such a stranglehold over legal normativity.

Brunnée and Toope's thesis falters because it equates legality with legitimacy, and elevates what would otherwise be an innocuous claim (that congruence with values increases voluntary compliance) to an unsustainable one (congruence is necessary for a normative proposition to be considered as law). Laurence Helfer and Erik Voeten's examination of the effect of European Court of Human Right judgments on LGBT issues illustrates this point.[118] The authors found that not only did ECtHR judgments impact the behaviour of states when Council of Europe member states were equivocal on the issue, but also that the judgments had a greater impact in

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[116] Brunnée & Toope, *Legality and Legitimacy,* 66-69, 86-87.
[117] Cf. Krisch, 'Review of Jutta Brunnée and Stephen Toope', 206.
[118] L.R. Helfer & E. Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', (2014) 68 International Organization 77.

states where support for LGBT issues was weakest.[119] Neither was congruence with the practice of Council of Europe states nor with the values of citizens necessary for the decision to be accepted as law and accordingly affect subjects' behaviour.[120]

C. Shared Values as a Criterion for Interpretive Legitimacy

Nevertheless, the work of Tyler and Jackson does lend support to the idea that an interpretation is more likely to be voluntarily accepted if it is congruent with the subjects' own understanding of the values that a particular legal regime is designed to advance.[121] Indeed, it is clear that the ILC also understood that the success of an interpretation was entirely dependent on the context in which it took place.[122]

The line of argument according to which interpretations should accord with the values of the community to which they are addressed is a well-trodden path in international law. Such arguments commonly revert to Stanley Fish's concept of the 'interpretive community' and Ian Johnstone's transposition of the theory into international law.[123] The main thrust of concept is that what constitutes an acceptable interpretation is determined by the community in which the

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119 Helfer & Voeten, 'International Courts as Agents of Legal Change', 100-03.

120 The authors conclude that an ECtHR judgment increases the likelihood of pro-LGBT domestic legislation by 14%; Helfer & Voeten, 'International Courts as Agents of Legal Change', 100.

121 I use legal regime here in the sense defined above, examples of which are the WTO and the ECHR. See fn 79 above.

122 See in particular, Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, [1966] Yearbook of the ILC, vol II, 94, para 1. See also G. Abi-Saab, 'The Appellate Body and Treaty Interpretation', in G. Sacerdoti *et al.* (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP 2006) 460 (stating that the VCLT rules 'is but a first step that does not tell the whole story. These rules are a toolkit used by all international fore; but they are used in different ways, yielding different results. This is because, as anyone who has had to sit on more that one of these fore knows, although they are all supposed to undertake the same type of activity, that is, to exercise the judicial function of which interpretation occupies a substantial part, each of them constitutes a legal universe quite different from others.')

123 S. Fish, *Is There a Text in This Class?* (Harvard UP 1980); I. Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities', (1990) 12 Michigan Journal of International Law 371. See also, M. Waibel, 'Interpretive Communities in International Law', in A. Bianchi, D. Peat & M.R. Windsor (eds), *Interpretation in International Law*.

interpretation occurs.[124] Rarely, however, do authors go on to address what a particular community considers to be an acceptable interpretation. Instead, invocation of the concept provides a 'comforting answer to our most taxing hermeneutical and epistemological problems';[125] it is a 'black box' that provides a 'safe sense of closure.'[126] This is all the more so when one considers the definitional ambiguity that surrounds the pertinent 'interpretive community'.[127]

A more productive approach would be to enquire what values constitute and characterise a particular interpretive community, and consequentially what interpretations are more likely to be accepted. An interpretation that accords with such values would increase the legitimacy of an interpretation. Operationalized in this way, the concept of an interpretive community would gain real utility. Primarily, it would enable the concept to serve its descriptive function more effectively: we would be able to understand *why* actors within that community accepted certain interpretation and not others. But it would also serve a normative purpose: once the values that characterise a particular interpretive community have been unearthed, we would be able to openly discuss whether the values accepted by that community are appropriate (and, if not, how they might be changed) and which interpretive approach would most successfully instantiate those values. It is at this level that fruitful debate regarding the appropriate interpretive method could occur, rather than sniping about the correct understanding of Waldock's Third Report.

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[124] F. Easterbrook, 'Abstraction and Authority', (1992) 59 University of Chicago LR 349, 359. See also, E. Moglen & R. Pierce, 'Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation', (1990) 57 University of Chicago LR 1203, 1207.

[125] P. Schlag, 'Fish v. Zapp: The Case of the Relatively Autonomous Self', (1987) 76 Georgetown LJ 37, 38.

[126] Waibel, 'Interpretive Communities', fn 17.

[127] Waibel, 'Interpretive Communities', 150.

Neil MacCormick and Robert Summers have forcefully advanced such a value-based approach to interpretation in the context of comparative law.[128] They consider that the justificatory force of interpretive arguments – whether linguistic, systemic, or teleological in nature – can only be understood in relation to the values that they promote in a legal order.[129] The textualist approach, for example, defers to the legislature on the basis that it is the supreme democratic body within liberal democracies, gives effect to the separation of powers between the judiciary and other branches of government,[130] and promotes certainty, predictability and security.[131] Teleological approaches, on the other hand, emphasise values related to the 'adequacy of the law to the needs of life, or adaptability of law to the changing contexts of its functioning.'[132] The acceptance of any particular interpretive approach is dependent on congruence between the values that approach promotes and the values that the addressees consider important in that particular context. It follows that understanding and assessing interpretations is inescapably and inevitably a matter of values: 'Interpretation is through and through a matter implicating fundamental values of the law. It can be done well only by those who study to achieve a reflective and balanced overall conception of the full set of inter-subjectively acknowledged values of law.'[133]

Within the international context, such an approach has clear benefits over a purely legalistic assessment of interpretation within the framework of the VCLT. First, it enables us to assess the interpretation for coherence with the values of the regime. This is the main approach taken in this thesis. Absent any prescribed interpretive legal methodology, examining interpretations for

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[128] See also N. MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 1 (stating 'it seems to me that the whole enterprise of explicating and expounding criteria and forms of good legal reasoning has to be in the context of the fundamental values that we impute to legal order'.)

[129] D.N. MacCormick & R.S. Summers, 'Interpretation and Justification', in D.N. MacCormick & R.S. Summers (eds), *Interpreting Statutes* (Dartmouth Publishing 1991) 532. See also W. Twining & D. Miers, *How to do Things with Rules* (5th edn, CUP 2010) 366.

[130] MacCormick & Summers, 'Interpretation and Justification', 534.

[131] J. Wroblewski, 'Statutory Interpretation in Poland', in MacCormick & Summers (eds), *Interpreting Statutes*, 282.

[132] Wroblewski, 'Statutory Interpretation in Poland', 282.

[133] MacCormick & Summers, 'Interpretation and Justification', 538.

coherence with the values that the legal regime is designed to uphold provides us with a neutral platform from which to assess a novel interpretive technique. Adopting such an approach also allows us to determine when and how recourse to domestic law might be considered to further the goals and values of the regime, and thus when it is likely to be viewed as legitimate in the eyes of the addressees.

Second, focussing on the values underpinning certain interpretive techniques explains why those techniques are privileged in particular settings. For example, it helps explain why a textual interpretation that promotes predictability and stability within the framework of the WTO is more likely to be accepted than a teleological interpretation. Similarly, it has potential to explicate why a textual approach to interpretation is less likely to be accepted as legitimate in the context of human rights interpretation (because textualism may not respond adequately to novel challenges to the protection of human dignity and bodily sanctity).

Third, and perhaps more fundamentally, it allows for a more profound and critical approach of interpretation than one that is undertaken from behind the veil of formal interpretive methodology. In the context of the WTO, for example, it opens the door to questions regarding if and when the goals of security and predictability should give way to environmental concerns, whether the DSU is the appropriate venue for this decision to be made, and how interpretation might be able to give effect to these goals. No longer are the fundamental values obfuscated behind deceptive formalistic legal method, but rather they are laid bare for all to see.

Whilst it has been argued that interpretations that reflect the 'inter-subjectively acknowledged values of the law' are more likely to be considered to be legitimate, how might one go about discerning what these values are? Two approaches are possible. The first would be to examine the constituent documents or subsequent pronouncements of the legal regime for direct

statements of the values that it aims to promote. Take, for example, Article 3.2 of the DSU of the WTO, which states 'the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system'. Panels, the AB, and the WTO membership have reiterated the importance of this value to the dispute settlement mechanism.[134]

However, rarely are pronouncements of the addressees of a decision so clear or so directly relevant to the values to be promoted by international adjudication.[135] It is more likely that the values underpinning a legal regime – and the place of adjudicatory bodies in promoting or protecting those values – could be induced from the accepted practice of the regime. Such an approach is admittedly not without issues. By basing legitimacy partly on values induced from the practice of states, it might be argued that such an approach slips into exactly the same apologist trap as Brunnée and Toope. Such a criticism would be mistaken: unlike Brunnée and Toope, I have not argued that legality and legitimacy are coextensive. Moreover, I am not addressing the question of legal obligation or the validity of the underlying legal norms; rather, I am addressing when an interpretation is *likely* to be considered as legitimate by its addressees. I take no view as to whether such an interpretation *should* be viewed as legitimate.[136]

Alternatively, it might be argued that the process of imputing fundamental values to a legal regime is a wholly subjective enterprise. As such, determining the legitimacy of an interpretation

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[134] J.T. Fried, '2013 in WTO Dispute Settlement: Reflections from the Chair of the Dispute Settlement Body', https://www.wto.org/english/tratop_e/dispu_e/jfried_13_e.htm; P. Lamy, 'The AWCL at Ten - Looking Back, Looking Forward' (4 October 2011), https://www.wto.org/english/news_e/sppl_e/sppl207_e.htm; Appellate Body Report, *Japan-Alcoholic Beverages II,* 31; Appellate Body Report, *EC-Computer Equipment*, para 82; Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review* WT/DS224/AB/R (15 December 2003), para 82; Appellate Body Report, *US-Stainless Steel (Mexico)* WT/DS344/AB/R (30 April 2008), para 160.

[135] Technically, *all* WTO members are not the addressees of specific interpretive decisions; only the parties to a case are bound by a report. However, the Appellate Body has stated that it will abide by its pronouncements unless there is good reason to depart from them, meaning that all members have an interest in the interpretations taken; Appellate Body Report, *Japan-Taxes on Alcoholic Beverages* WT/DS8 & 10 & 11/AB/R (4 October 1996), 14.

[136] Thomas, 'The Uses and Abuses of Legitimacy', 741-42.

by reference to subjectively imputed values is not useful or enlightening. However, such a critique only holds purchase if the values that are imputed to the legal regime by the external observer are different to those that the addressees of a legal decision impute. If this is not the case then by approaching interpretation in this way we can explain why some interpretations are more likely to be voluntarily accepted, helping us understand how and why domestic laws are and should be used in interpretation.

To conclude, the acceptance of any particular interpretive approach is dependent on congruence between the values that the approach promotes and the values that the addressees consider important in that particular context. This 'value-coherence' approach has several benefits but most importantly it allows us to assess within a particular legal regime if and when the use of domestic laws in interpretation is likely to be accepted.

CONCLUSION

The argument in this chapter has been two-fold. First, it has argued that there is a link between voluntary compliance with the law and legitimacy. Whilst caution must be exercised, recent empirical work conducted in the realm of criminology lends support to Tom Franck's claim that perceived legitimacy increases the 'compliance-pull' of a legal rule. Second, it elaborated a tri-partite definition of legitimate interpretation, composed of three elements: interpretive authority, procedural justice, and shared understandings. Although this approach was drawn from the empirical literature, normative arguments for each element were made, as well as appropriate modifications to account for the particular characteristics of interpretation by international courts and tribunals. The final, crucial element emphasises that the voluntary acceptance of interpretations is dependent on congruence between the values that interpretation promotes and the values that the addressees consider important in that particular context.

The following three chapters of this thesis test the hypotheses posited in Chapter 1 and apply the analytical framework elaborated in this chapter to three case studies: the International Criminal Tribunal for the former Yugoslavia, the European Court of Human Rights, and the World Trade Organization. Each chapter in Part II takes the same form: after a brief introduction, the use of domestic law in interpretation is detailed; for each example, the arguments for and against the use of domestic law are addressed; the use of domestic law is then outlined and analysed within the legitimacy framework developed in this chapter. In the Conclusion, the hypotheses outlined in Chapter 1 are revisited in light of the uses of domestic law described in Part II.

Part Two

4.

DOMESTIC LAW AS SYSTEM BUILDING: THE ICTY

INTRODUCTION

In the late spring of 1992, the Secretary-General of the UN delivered a report to the Security Council that captured the attention of the international community. Yugoslavia – from which Croatia and Slovenia had declared independence less than a year before – had fallen into a pitched civil war, fuelled by bitter ethnic tensions between Serb, Croat and Muslim communities. Nestled in the centre of the former unified state, the nascent republic of Bosnia-Herzegovina became the scene of atrocities not seen since the Second World War.[1] The Serbs of Bosnia-Herzegovina, the Secretary-General reported, were making a 'concerted effort ... to create "ethnically pure" regions' in the Republic,[2] employing tactics that 'were as brutal as they were effective'.[3] Reports on the situation documented the grim scene: the killing or displacement of 2.1 million Bosnians by the summer of 1993,[4] the systematic rape of women and girls, and the operation of 715 detention centres in which rape, torture, and execution was commonplace.[5]

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[1] At the time of the reference on independence, the Bosnian population consisted of 43% Slavic Muslims, 31% Serbs and 17% Croats; V. Morris & M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for The Former Yugoslavia* vol. 1 (Transnational Publishers 1995) 19.

[2] *Further Report of the Secretary-General pursuant to Security Council Resolution 749 (1992)* 12 May 1992 S/23900, para 5.

[3] Morris & Scharf ICTY vol. 1, 22.

[4] Morris & Scharf ICTY vol. 1, 22.

[5] *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),* annexed to Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council 27 May 1994 S/1994/674, paras 216–53.

The gravity of such acts led to the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY),[6] which came into existence on 25 May 1993.[7] It was hoped that the Tribunal would facilitate the restoration of peace and stability in the area, providing a forum in which those that were guilty of grave breaches of international humanitarian law could be brought to justice.[8] As the first international criminal tribunal to be established since the Nuremberg and Tokyo international military tribunals in the wake of the Second World War,[9] the ICTY was faced with a Statute that contained 'not much more than the skeletons of crimes' within its jurisdiction,[10] as well as procedural rules that had scant precedent to draw on.[11] By establishing an international tribunal 'on the basis of a laconic statute, a brief preparatory report and a few pages of debates, the Security Council left the judges with little choice but to innovate.'[12] In an attempt to bridge the gap between vague rules and concrete application, the Tribunal had frequent recourse to domestic law in the interpretation of its Statute and Rules of Procedure and Evidence (RPE).[13]

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[6] See T. Meron, 'Rape as a Crime under International Humanitarian Law', (1993) 87 AJIL 424.

[7] UN SC Res 827 (1993) 25 May 1993 (establishing the ICTY). On the appropriateness of establishing the *ad hoc* tribunals by Security Council resolution, as opposed to convention or resolution of the UN General Assembly, see Morris & Scharf ICTY vol. 1, 40-8; M.C. Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers 1996) 220; *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* 3 May 1993 S/25704, paras 19-29; M. Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda* (Ph.D. Thesis, Leiden 2006) 43-9, <openaccess.leidenuniv.nl/bitstream/handle/1887/5434/Thesis.pdf?sequence=1>.

[8] G. Mettraux, *International Crimes and the ad hoc Tribunals* (OUP 2005) 3.

[9] The International Military Tribunal at Nuremberg was established in August 1945 by virtue of a conventional agreement, the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (the London Agreement), 8 August 1945, UNTS 279. The International Military Tribunal for the Far East, on the other hand, was established by military order in January 1946; Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946, 4 Bevans 20.

[10] Mettraux, *International Crimes,* 5.

[11] *Prosecutor v Tadic,* Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995), para 20.

[12] W. Schabas, 'Interpreting the Statutes of the ad hoc Tribunals' in L.C. Vohrah *et al* (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 848.

[13] Interestingly, in the process of the drafting of the Report of the Secretary-General on the ICTY, Canada suggested explicitly that 'Reference could be made to appropriate national law, if necessary, for interpretive purposes.' Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General 14 April 1993 S/25594, para 11.

This chapter is divided into four sections. In the remaining part of the introduction, the historical and legal background of the ICTY is described. Section I outlines the use of domestic law by the chambers of the ICTY to interpret the crime of rape in the cases of *Furundzija* and *Kunarac*. It continues to assess the cogency of the argument against the use of domestic law from the perspective of the principle of legality. Section II examines the use of domestic laws in the interpretation of legal institutions imported from national legal systems, namely the guilty plea and the ability to issue *subpoenas* or binding orders in the cases of *Erdemovic* and *Blaskic*. It then addresses the argument against the use of domestic law advanced by Judge Cassese in *Erdemovic* and the Appeals Chamber in *Blaskic* based on the unique nature of international criminal law. Finding that neither of the arguments against the use of domestic law convincingly refutes the potential utility of domestic law, the final section of the chapter moves to assess the reasoning of the ICTY within the framework of legitimacy elaborated in the previous chapter. The chapter concludes that the use of domestic law was legitimate in the context in which the ICTY was operating; it was the only interpretive aid that allowed the two values underpinning the creation of the ICTY – the punishment of serious violations of IHL by judicial, as opposed to political, means – to be fulfilled.

The case law of the ICTY provides a rich repository of instances in which comparative law has been used, both demonstrating the import of studying the topic and illustrating the diversity of the use of domestic laws. Before moving to the examination of how the ICTY has interpreted substantive prohibitions and procedural rules, an overview of the formation of the tribunal, including specifications of the applicable law, is necessary.

i. A Brief History of the ICTY

In the wake of the Secretary-General's Report reporting alleged war crimes in the territory of the former Yugoslavia, the Security Council formed a Commission of Experts tasked with

investigating potential grave breaches of international humanitarian law.[14] The Commission documented and collated information relevant to the purported breaches, which ultimately totalled over 65,000 pages.[15] The Interim Report of the Commission also noted the possibility of establishing an International Tribunal, adding to an increasing number of voices that had made similar recommendations in late 1992 and early 1993.[16] On the same day that the Commission's Interim Report was released, the Conference on Security and Co-operation in Europe (CSCE) circulated a report examining the possibility of an international tribunal at a meeting of the Human Rights Commission in Geneva,[17] with France and Italy making their own proposals for an international tribunal shortly thereafter.[18]

As impetus for the creation of an international tribunal amongst UN member states and civil society mounted, the Security Council passed Resolution 808 on 22 February 1993, providing that 'an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former

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[14] UN SC Res 780 (1992) 9 October 1992 S/RES/780. The Commission of Experts was formed *inter alia* on the recommendation of the newly appointed Special Rapporteur for the Human Rights Commission; *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of the Commission Resolution 1992/S-1/1* annexed to *The situation of human rights in the territory of the former Yugoslavia – Note by the Secretary-General* 3 September 1992 S/24516, para 70.

[15] *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, para 20.

[16] 'The Commission was led to discuss the idea of an ad hoc international tribunal...The Commission observes that such a decision would be consistent with the direction of its work'; *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)* annexed to Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council 10 February 1993 S/25274, para 74. See also, *Report on the situation of human rights in the territory of the former Yugoslavia prepared by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 15 of the Commission Resolution 1992/S-1/1 and Economic and Social Council decision 1992/305* annexed to *The situation of human rights in the territory of the former Yugoslavia – Note by the Secretary-General* 17 November 1992, para 140; *Report of the Secretary-General on the Activities of the International Conference on the former Yugoslavia* 2 February 1993 S/25221, para 9;

[17] *Proposal for an International War Crimes Tribunal for the former Yugoslavia* 9 February 1993, reproduced in Morris and Scharf, ICTY vol. 2, 211-310.

[18] Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General 10 February 1993 S/25266; Letter Dated 18 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General 18 February 1993 S/25300. In the following four months, a further 13 proposals for an international tribunal were circulated by states, international organisations and non-governmental organisations; for a full list including reproductions of the proposals, see Morris and Scharf, ICTY vol. 2, 209-480.

Yugoslavia', as well as formally requesting the Secretary-General of the UN to submit a report on 'all aspects of this matter, including specific proposals [regarding the Tribunal]...' The Report of the Secretary-General, taking into account suggestions from member states, proposed a statute for an *ad hoc* tribunal in May 1993,[19] which was unanimously approved by the Security Council in Resolution 827 (1993). The ICTY was created as a subsidiary body of the Security Council (within the meaning of Article 29 of the UN Charter)[20] under the authority vested in the Security Council by Chapter VII.[21]

ii. The Subject Matter Jurisdiction of the ICTY[22]

Paragraph 29 of the Report of the Secretary-General states that

> It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.[23]

The applicable law of the Tribunal was hence that which was 'beyond any doubt part of customary law'.[24] Such an approach was necessary, in the view of the Report, to accord with the

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[19] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808*.

[20] Article 29 of the UN Charter provides that 'The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.'

[21] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808*, para 28. By 'determining that this situation [genocide in the former Yugoslavia] continues to *constitute a threat to international peace and security*', the Security Council framed the situation so that it came within its primary responsibility under Article 24(1) of the UN Charter and enabled measures to be taken under Chapter VII; UN SC Res 827 (1993).

[22] Matters of personal, territorial, temporal and concurrent jurisdiction are not pertinent for the subject matter of this thesis, and will not be outlined here. For more information, see Morris and Scharf, ICTY vol. 1, 89-136.

[23] Emphasis added. See also, *Prosecutor v Hadžihasanović* (Command Responsibility Appeal Decision) IT-01-47-AR72 (16 July 2003), para 55.

[24] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808*, para 34.

principle of *nullum crimen sine lege*[25] (also referred to by some commentators as the 'principle of legality') whereby actions cannot be criminalised unless a clear, specific criminal prohibition existed at the time of the alleged violation.[26] The Report recommended that the Tribunal have subject-matter jurisdiction over grave breaches of the Geneva Conventions of 1949, which constituted 'the core of customary international law applicable in international armed conflicts';[27] violations of the law or customs of war, as reflected in the 1907 Hague Convention (IV) and annexed regulations;[28] genocide, as codified in the 1948 Genocide Convention;[29] and crimes against humanity, encompassing murder, torture, and rape.[30] Jurisdiction over these matters was enshrined in Articles 2 to 5 of the Statute of the ICTY. In the Statute, domestic law is only mentioned explicitly in relation to sentencing, and is only applicable insofar as it constitutes 'general practice regarding prison sentences in the courts of the former Yugoslavia'.[31]

Aside from contextualising the cases that will be examined in the following pages, this brief detour into the history of the ICTY demonstrates one important point. The subject-matter jurisdiction of the ICTY was based on what the Secretary-General considered to be extant,

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[25] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808,* para 34. The limitation of the law applicable by the Tribunal to customary law was 'so that the problem of adherence of some but not all States to specific conventions does not arise'; *ibid.* The Secretary-General did, however, consider that 'some of the major conventional humanitarian law has become part of customary international law'; *ibid* paras 33, 35.

[26] See A. Cassese *et al*, *Cassese's International Criminal Law* (3rd ed., OUP 2013) 22 *et seq.*

[27] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808,* para 37.

[28] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808,* paras 41-4.

[29] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808,* paras 45-6.

[30] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808,* paras 47-9.

[31] ICTY, *Updated Statute of the International Criminal Tribunal for the former Yugoslavia* September 2009 art. 24(1) <www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>. Cf the proposals by the CSCE, Amnesty International, and Slovenia, which all permitted – to a greater or lesser extent – application of domestic law; Morris & Scharf, ICTY vol. 1, 369-70. A similar demarche led to the creation of the ICTR eighteen months later, the Statute of which is largely based on the Statute of the ICTY with only minor modifications; *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)* 13 February 1995 S/1995/134, para 9; V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda* (Transnational Publishers 1998) vol. 1, fn 466; W. Schabas *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 30.

partially codified rules of customary international law.[32] These rules may have been, and ultimately proved to be, insufficiently defined for application. However, that does not detract from the fact that the normative authority of the legal rules had been recognised,[33] obviating the need to establish the legal proposition as a formally valid rule of international law prior to its application. This supports the view (which is also borne out by case law) that when the Tribunal defined or substantiated the legal concepts examined below – whether an international crime or a procedural rule – it was *interpreting* the rule, as opposed to enquiring if it is a valid rule. These are two qualitatively different processes. Domestic laws may form the basis of the validity of legal propositions if the laws either demonstrate the *opinio juris* of that state in the case of customary law,[34] or if the laws manifest a general principle of law.[35] In the cases examined, however, domestic law plays neither of these roles. Instead, it is drawn on in a stage of reasoning when the question of legal validity has already been settled.

The use of domestic law has been called 'the most varied and unexplained' use of any interpretive aid by the Tribunal.[36] The absence of a clear, unified methodology for the use of, or attribution of authority to, domestic laws has detracted from the perceived appropriateness of technique. The examples adduced in this chapter demonstrate two ways in which the Tribunal has used domestic laws in interpretation: first, the use of domestic laws to define the crime of rape; second, the use of domestic laws to interpret a domestic legal institution transposed to the

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[32] In the case of Article 3 of the Statute of the ICTY, 'Violations of the laws or customs of war', the Statute enumerates a non-exhaustive list of prohibited acts, leaving the door open for the ICTY to ascertain novel custom. A similar non-exhaustive list is included in Article 4 of the Statute of the ICTR, 'Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II'.

[33] See also Statement by the Representatives of the United Kingdom, New Zealand and Brazil to the Security Council, reiterating that the ICTY is limited to applying extant legal norms; *Provisional Verbatim Record of the 3217th Meeting of the Security Council* 25 May 1993, S/PV/3217.

[34] See for example the *Jurisdictional Immunities* case, in which the ICJ examined domestic laws to assess whether a customary rule of immunity for state officials' tortious acts in other states existed; *Jurisdictional Immunities of the State (Ger. v It.),* Judgment, paras 70–78.

[35] *Procès-Verbaux of the Proceedings of the Committee of Jurists, June 16th - July 24th 1920 with Annexes,* 335; *Corfu Channel case* (Albania v U.K.) (Merits), Judgment, [1949] ICJ Rep. 4, 18.

[36] L. Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014) 65.

ICTY Statute, such as guilty pleas or *subpoena duces tecum*/binding orders. Each of these uses raises its own issues that will be addressed in the respective sections.[37]

I. INTERPRETING RAPE

i. The Historic Evolution of the Crime of Rape

One of the most controversial uses of domestic law by the ICTY is the interpretation of the crime of rape under Article 3 of the Statute. The earliest legal prohibitions of rape in times of war can be traced back to the fourteenth and fifteenth century war ordinances of Richard II (1385) and Henry V (1419),[38] although its modern form is normally traced to the U.S. Lieber Code of 1863, which provided that 'all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death...'[39] In the post-World War Two era, rape was successfully prosecuted at the Tokyo War Crimes Tribunal,[40] and was included as a crime against humanity in Council Control Law No. 10, which regulated the Occupying Powers' individual war

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[37] One example that will not be examined in this thesis for reasons of space is the interpretation of the accused's Article 21 right to a fair trial, in which domestic law has frequently been invoked; see *Prosecutor v Tadic,* Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995), para 38-42, 47-48, 60-71; *Prosecutor v Kupreskic* (Appeals Chamber Judgement) IT-95-16-A (23 October 2001) paras 34-41 (when reliance on visual identification of the perpetrator is unsafe (Article 21)); *Prosecutor v Limaj et al* (Trial Chamber Judgement) IT-03-66-T (30 November 2005), para 17 (when reliance on visual identification of the perpetrator is unsafe (Article 21)); *Prosecutor v Naletilic* (Appeals Chamber Judgement) IT-98-34-A (3 May 2006) fn 465 (the extent to which defendants have a right to confront witnesses under Article 21(4)(e)); *Prosecutor v Strugar* (Appeals Chamber Judgement) IT-01-42-A (17 July 2008), paras 52-54 (on the requirement to be fit to stand trial 'implicit in Articles 20 and 21 of the Statute').

[38] These ordinances are reprinted in T. Twiss, *The Black Book of the Admiralty* vol 1 (Longman 1871) 453, 468. It was also mentioned by Alberico Gentili in *De Iure Belli Libri Tres* that 'to violate the honour of women will always be held to be unjust'; A. Gentili, *De Jure Belli Libri Tres* (Translation by J C Rolfe, OUP 1933) §421. See generally, T. Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (OUP 1993), chps 6 & 8.

[39] General Orders No. 100: Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D. (Government Printing Office 1898), art 44, <avalon.law.yale.edu/19th_century/lieber.asp#sec2>.

[40] See Meron, 'Rape as a Crime under International Humanitarian Law', 426.

crimes courts operating in Germany.[41] Despite numerous conventional provisions prohibiting rape in times of war – notably, Article 27 of the fourth Geneva Convention of 1949, and Articles 76(1) and 4(2)(e) of Additional Protocols I and II of 1977, respectively[42] – doubts persisted in the latter half of the twentieth century as to whether rape constituted a 'grave breach' of the Geneva Conventions capable of giving rise to individual criminal responsibility.[43]

However by 1993, any hesitation to recognize rape as a war crime or a grave breach of the Geneva Conventions had started to dissipate.[44] In late 1992, the International Committee of the Red Cross (ICRC) stated that rape constituted a grave breach under the fourth Geneva Convention, a sentiment that was echoed shortly after by the United States, which considered that 'the legal basis for prosecuting troops for rape is well established under the Geneva Conventions and customary international law.'[45] In early 1993, during negotiations regarding the formation of the ICTY, the widespread and systematic nature of rape and sexual assault in the former Yugoslavia became apparent.[46] The concern of the international community was reflected in the proposals for the Statute of the Tribunal that were advanced: proposals from the United States and France both classified rape as a grave breach of the Geneva Conventions, whereas the

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[41] Council Control Law No. 10, art 2(1)(c) (1946) 3 Official Gazette Control Council for Germany 50-55. Rape was not, however, included in the subject-matter jurisdiction of the Nuremberg Tribunal; Statute of the International Military Tribunal, art 6, reproduced in *Procès des Grands Criminels de Guerre Devant Le Tribunal Militaire International Tome 1: Documents Officiels* (Secretariat of the International Military Tribunal 1947).

[42] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, art 27; Additional Protocol I to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (12 December 1977) 1125 UNTS 3, art 76(1); Additional Protocol II to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) art 4(2)(e).

[43] Rape was not explicitly included in the 'grave breaches' provisions of the Conventions; see Geneva Convention (IV), art 147, Additional Protocol I, arts 11, 85; N. Hayes 'Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals' in Darcy & Powderly (eds), *Judicial Creativity at the International Criminal Tribunals,* 130.

[44] Meron, 'Rape as a Crime under International Humanitarian Law', 426.

[45] Cited in Meron, 'Rape as a Crime under International Humanitarian Law', fn 22.

[46] 'We must ensure that the voices of the groups most victimized are heard by the Tribunal. I refer particularly to the detention and systematic rape of women and girls, often followed by cold-blooded murder'; statement of the Permanent Representative of the United States of America, *Provisional Verbatim Record of the 3217th Meeting of the Security Council* 25 May 1993, S/PV.3217.

proposals of Italy, the Netherlands, the Organization of the Islamic Conference and the Secretary-General re-affirmed rape as a crime against humanity.[47] On the suggestion of the Secretary-General,[48] rape was explicitly included in the list of crimes against humanity over which the ICTY has jurisdiction.[49] As a reflection of the fact that these crimes can also be committed in non-international conflicts, the Statute of the ICTR also explicitly classifies rape as a crime against humanity, as well as recognising that rape may constitute a serious violation of common Article 3 and the Additional Protocol I of the Geneva Conventions.

ii. Interpretation of Rape within the ICTR/ICTY

Whilst the prohibition on rape had been indubitably recognised as a rule of international criminal law, the question of which acts constituted rape had neither been defined in conventional nor customary law, nor in judicial practice. The first judgment to address the issue was *Akayesu,* delivered by the Trial Chamber of the ICTR in September 1998.[50]

Akayesu was *bourgemestre* of a commune in Rwanda, charged with 'the performance of executive functions and maintenance of public order within his commune'.[51] In 1994, hundreds of Tutsi civilians sought refuge in the *bureau communal* of Akayesu's commune, only to be subjected by beatings, sexual assault, rape and murder at the hands of local militia and the police.[52] The Prosecutor of the ICTR charged Akayesu *inter alia* with rape[53] as a crime against humanity, and as

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[47] Morris & Scharf, ICTY vol 1, 379-83. The report of the Commission of Experts, as well as proposals by the National Alliance for Women's Organizations (NAWO), Amnesty International, and the Lawyers Committee for Human Rights also viewed rape as a crime against humanity.

[48] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808*, para 48.

[49] Statute of the ICTY, art 5(g).

[50] *Prosecutor v Akayesu* (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998).

[51] *Akayesu* (Trial Chamber Judgement), para 4.

[52] *Akayesu* (Trial Chamber Judgement), para 12A.

[53] The charge of rape was included on an amended indictment which was modified following questioning from the Bench brought to light evidence of rape and sexual assault; N. Pillay, 'Equal Justice for Women: A Personal Journey', (2008) 50 Arizona LR 657, 665-66.

a violation of Common Article 3 and the Second Additional Protocol of the Geneva Conventions. The Trial Chamber acknowledged that

> [T]here is no commonly accepted definition of [rape] in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.[54]

Moving away from the more traditional approaches to defining rape commonly found in domestic law, which specify *actus reus* and *mens rea* requirements,[55] the Trial Chamber opted for a broad conception of rape that defined the crime as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.'[56] This definition has been widely praised for shifting the focus to 'the overwhelming [coercive] circumstances which are knowingly exploited by the perpetrator, rather than [restricting] the context and criminality of the act to the internal acquiescence of the victim.'[57] The conceptual definition enunciated in *Akayesu* was followed two months later in the *Celebici* case, the first case involving rape to be heard by the ICTY.[58]

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[54] *Akayesu* (Trial Chamber Judgement), para 596.

[55] See, for example, Section 1 of the UK Sexual Offences Act 2003, defining rape as follows:

(1) A person (A) commits an offence if –

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

[56] *Akayesu* (Trial Chamber Judgement), para 598.

[57] Hayes, 'Creating a Definition of Rape', 134. See also, Pillay, 'Equal Justice for Women', 666-67; Pillay, herself one of the judges in the Trial Chamber in *Akayesu,* stated that 'I must say that the testimony of one of the witnesses motivated me to reexamine traditional definitions of rape. Witness "JJ" was being asked by the prosecutor, in respect of each of the multiple rapes she endured, whether there was penetration: "I am sorry to keep on asking you each time--did your attacker penetrate you with his penis?" Her answer was: "That was not the only thing they did to me; they were young boys and I am a mother and yet they did this to me. It's the things they said to me that I cannot forget."' See also P. Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law', (2013) 54[3] Boston College LR 1207, 1210.

[58] *Prosecutor v Delalic* (Trial Chamber Judgment) IT-96-21-T (16 November 1998), para 478.

Just one month after the *Celebici* judgment, the ICTY was again required to interpret the crime of rape in the case of *Furundzija*.[59] The reasoning of the Trial Chamber in *Furundzija* is one of the clearest examples of recourse to the comparative interpretive method that exists in international case law. In that case, the Defendant was leader of the Jokers, a special unit within the armed forces of the Croatian Community of Herzeg-Bosna, which raped and tortured a female Bosnian Muslim civilian.[60] The Trial Chamber dismissed the *Akayesu* definition for want of specificity,[61] and, stating that 'no definition of rape can be found in international law',[62] reasoned that

> [To] arrive at an accurate definition of rape based on the criminal law principle of specificity (Bestimmtheitgrundsatz, also referred to by the maxim "nullum crimen sine lege stricta"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.[63]

This reliance was subject to two caveats: first, that reference should not be made solely to jurisdictions belonging to one 'legal family', such as common or civil law; and second, that account must be taken of the 'specificity of international criminal proceedings when utilising national law notions.'[64] The Chamber surveyed the definition of rape in 18 legal systems,[65] noting that 'most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.'[66] Although the Tribunal did not find a universal definition of

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[59] *Prosecutor v Furundžija* (Trial Chamber Judgement) IT-95-17/1-T (10 December 1998).
[60] *Furundžija* (Trial Chamber Judgement), paras 121 – 130.
[61] *Furundžija* (Trial Chamber Judgement), para 177.
[62] *Furundžija* (Trial Chamber Judgement), para 175.
[63] *Furundžija* (Trial Chamber Judgement), para 177 (emphasis added).
[64] *Furundžija* (Trial Chamber Judgement), para 178.
[65] *Furundžija* (Trial Chamber Judgement), fns 207-14. The comparative survey examined Chile, China, Germany, Japan, the SFRY, Zambia, Austria, France, Italy, Argentina, Pakistan, India, South Africa, Uganda, New South Wales, the Netherlands, England and Wales, and Bosnia and Herzegovina.
[66] *Furundžija* (Trial Chamber Judgement), para 181. Domestic laws did not, however, agree as to whether forced oral penetration constituted rape. The Chamber adopted a teleological approach with regard to this point, stating that the

rape in criminal systems throughout the world – indeed, it explicitly acknowledged significant divergence between jurisdictions regarding whether forced oral sex constituted rape – it recognised that rape attached 'to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced penetration.'[67] Drawing from this conclusion, the Chamber defined rape as

> (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[68]

Both the first sentence of the *actus reus* (that rape covers vaginal and anal penetration with a penis or any other object) and the second limb of the test (the requirement of coercion or threat or use of force) are drawn from the Chamber's examination of the laws of rape in domestic jurisdictions.

The *Furundzija* definition of the crime of rape was affirmed on appeal.[69] However, the ICTR subsequently re-affirmed the *Akayesu* definition, which in its view 'clearly encompasse[d] all the conduct described in the definition of rape set forth in *Furundzija*.'[70] In light of the continuing

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raison d'être of international humanitarian law is to protect dignity, and forced oral penetration constituted 'a most humiliating and degrading attack upon human dignity'. As such, it was to be included within the definition of rape; *Furundžija* (Trial Chamber Judgement), para 183.

[67] *Furundžija* (Trial Chamber Judgement), para 179.

[68] *Furundžija* (Trial Chamber Judgement), para 185.

[69] *Prosecutor v Furundzija* (Appeals Chamber Judgement) IT-95-17/1-A (21 July 2000) paras 211-12.

[70] *Prosecutor v Musema* (Trial Chamber Judgement) ICTR-96-13-T (27 January 2000) para 227. As Hayes notes, this adherence to the *Akayesu* definition was unsurprising 'given that the Trial Chamber contained the same three judges as in *Akayesu*'; Hayes, 'Creating a Definition of Rape', 140.

divergence between the 'conceptual' *Akayesu* and the more 'mechanistic' *Furundzija* definitions of rape, the issue was raised again in the case of *Kunarac* before the ICTY.[71]

In that case, the three accused – members of the Bosnian Serb military accused of participating in the Foca "Rape Camps"[72] – were charged with rape as a crime against humanity and as a breach of the laws or customs of war. The Trial Chamber acknowledged that the *Furundzija* definition provided the *actus reus* element of the crime of rape in international law but that 'in the circumstances of the present case the Trial Chamber considers that it is necessary to clarify its understanding of the element in paragraph (ii) of the *Furundzija* definition.'[73] The Chamber continued:

> In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundzija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which ... is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.[74]

As in *Furundzija*, the Trial Chamber turned to explain why reference to domestic laws could aid the interpretation of the crime of rape:

> [T]he value of these sources is that they may disclose "general concepts and legal institutions" which, if common to a broad spectrum of national legal systems, disclose an international

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[71] *Prosecutor v Kunarac* (Trial Chamber Judgement) IT-96-23-T & IT-96-23/1-T (22 February 2001).

[72] For more information on the Foca "Rape Camps", see M. Fiori, 'The Foca "Rape Camps": A dark page read through the ICTY's jurisprudence', (2007) 2[3] Hague Justice Journal 9, <www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_2%283%29/The%20Foca_Fiori_EN.pdf>, archived at <www.webcitation.org/6SQvJhsUY>.

[73] *Kunarac* (Trial Chamber Judgement), para 438.

[74] *Kunarac* (Trial Chamber Judgement), para 438 (footnotes omitted).

> approach to a legal question which may be considered as an appropriate indicator of the international law on the subject.[75]

The Chamber considered that the 'common denominator' of rape, as found in the domestic laws of 38 jurisdictions,[76] was wider than the requirement for force, threat of force or coercion proposed by the Trial Chamber in *Furundzija*. In the opinion of the Trial Chamber, the true common denominator of the surveyed jurisdictions was that 'serious violations of sexual *autonomy* are to be penalised.'[77] Thus, whilst accepting the *actus reus* limb of the *Furundzija* definition, the Trial Chamber considered that the 'coercion or force or threat of force' requirement should be expanded to criminalise the specified sexual acts 'where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily as a result of the victim's free will, assessed in the context of the surrounding circumstances.'[78]

On appeal, the ICTY Appeals Chamber elaborated on whether true consent was ever possible when the victim was a detainee in an armed conflict. It examined domestic laws that criminalise sexual acts between prisoners and inmates as crimes of strict liability, or which carry a presumption of non-consent.[79] The Chamber interpreted rape in international criminal law in accordance with these laws, recognizing the possibility that there could be circumstances that 'were so coercive as to negate any possibility of consent.'[80]

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[75] *Kunarac* (Trial Chamber Judgement), para 439 (emphasis added).
[76] The comparative study surveyed the laws of Bosnia & Herzegovina, Germany, South Korea, China, Norway, Austria, Spain, Brazil, United States (New York, Maryland, Massachusetts, California), Switzerland, Portugal, France, Italy, Denmark, Sweden, Finland, Estonia, Japan, Argentina, Costa Rica, Uruguay, Philippines, England & Wales, Canada, New Zealand, Australia (New South Wales, Victoria, ACT, Western Australia, South Australia), India, Bangladesh, South Africa, Zambia and Belgium; *Kunarac* (Trial Chamber Judgement), paras 443-45, 447-52, 453-56.
[77] *Kunarac* (Trial Chamber Judgement), para 457.
[78] *Kunarac* (Trial Chamber Judgement), para 460.
[79] *Prosecutor v Kunarac* (Appeals Chamber Judgment) IT-96-23 & IT-96-23/1-A (12 June 2002), para 131; citing laws from Germany and the United States (California, New Jersey, the District of Columbia).
[80] *Kunarac* (Appeals Chamber Judgment), para 132.

iii. The Legacy of the ICTY Approach

The interpretation of the crime of rape in *Kunarac* has become 'the most widely used definition in the ICTY, ICTR and Special Court for Sierra Leone,'[81] and the antecedent upon which it is based, *Furundzija*, forms the basis for the definition of rape in the Elements of Crimes of the International Criminal Court (ICC).[82] At the time of the Trial Chamber judgment in *Furundzija*, it was clear that a conventional definition of rape in international criminal law was unlikely to come to fruition. The case was decided just a few months after conclusion of the Rome Statute of the ICC, which failed to define the crime as a result of the fundamentally different philosophical, legal, and cultural approaches of the delegates to sexual offences, and to rape in particular.[83]

However, where the delegates to the Rome conference failed, the Preparatory Committee for the ICC Elements of Crime succeeded, elaborating a definition of rape that was confirmed by the first Assembly of States Parties in 2002. This definition drew upon the jurisprudence of the ICTY and ICTR, giving most weight to the definition expounded by the Trial Chamber in *Furundzija*. This was thought to be 'particularly persuasive because its definition of rape was

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[81] V. Oosterveld, 'Legal Traditions and International Criminal Gender Jurisprudence', (2013) 2[4] CJICL 825, 831; M. Eriksson, *Defining Rape: Emerging Obligations for States under International Law* (Martinus Nijhoff 2011) 407, 424; See *Prosecutor v Kvocka* (Trial Chamber Judgement) IT-98-30/1-T (2 November 2001) paras 177-79; *Prosecutor v Semanza* (Trial Chamber Judgement) ICTR-97-20-T (15 May 2003) paras 344-46; *Prosecutor v Kajelijeli* (Trial Chamber Judgement) ICTR-98-44A-T (1 December 2003) paras 910-15; *Prosecutor v Kamuhanda* (Trial Chamber Judgement) ICTR-95-54A-T (22 January 2004) paras 705-9; *Prosecutor v Taylor* (SCSL Trial Chamber) SCSL-03-01-T (18 May 2012) para 415. Cf. *Prosecutor v Niyitegeka* (Trial Chamber Judgement) ICTR-96-14-T (16 May 2003) para 456. The ICTR Trial Chamber in *Muhimana* effectively held the *Kunarac* definition to be an elaboration of the *Akayesu* definition; *Prosecutor v Muhimana* (Trial Chamber Judgement) ICTR-95-1B-T (28 April 2005) paras 550-51. Subsequently, the ICTR Appeals Chamber in *Gacumbitsi* followed the *Kunarac* definition; *Prosecutor v Gacumbitsi* (Appeals Chamber Judgement) ICTR-2001-64-A (7 July 2006) paras 151-52.

[82] Wiener, 'The Evolving Jurisprudence of the Crime of Rape', 1217. See Article 7(1)(g)-1, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York,* 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B.

[83] Rome Statute, article 7(1)(g); W. Schabas, *An Introduction to the International Criminal Court* (4th ed., CUP 2011) 117. Note that a definition of rape was originally considered in the 1996 Preparatory Committee for the Rome Statute, which defined rape as 'causing a person to engage in or submit to a sexual act by force or threat of force'; M.C. Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* vol. 2 (Transnational Publishers 2005) 53. See also, K. Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent' (2001) 32 Columbia Human Rights LR 625, 644.

based on a survey of municipal rape law and thus came with the authority of timeliness and neutrality.'[84] Indeed, as Kristen Boon notes, the influence of the *Furundzija* definition is demonstrated by the fact that the proposal for the definition of rape put forward by Costa Rica, Hungary, and Switzerland mirrored word-for-word the definition laid down by the Trial Chamber.[85]

Refusal by the ICTY to elaborate a definition of the crime of rape would have put the Preparatory Commission of the Elements of Crime back to the position of paralysis in which the states parties to the Rome Statute found themselves. The judgments of the tribunals, and in particular that of the *Furundzija* Trial Chamber, have enabled international criminal law to move past the social, cultural and moral divides that stymied a conventional definition of rape.

iv. An Affront to the Principle of Legality?

Despite their considerable legacy, arguments have still been levelled at the reasoning of the ICTY in *Furundzija* and *Kunarac*, and against the use of domestic law in particular. This section examines the main principled argument that could be brought against the use of domestic law based on the principle of legality.[86]

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[84] Boon, 'Rape and Forced Pregnancy under the ICC Statute', 646.

[85] *Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 para. 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xvi), (xxi), (xxii), (xxvi)*, Preparatory Commission for the International Criminal Court (19 July 1999) PCNICC/1999/WGEC/DP.8; Boon, 'Rape and Forced Pregnancy under the ICC Statute', fn 95.

[86] See for example, J. Corsi, *Legal Fictions: Creating the Crimes of Rape and Sexual Violence under International Law* (Ph.D. thesis, University of Cambridge 2015). Methodological critiques have been levelled at the ICTY for their use of domestic law, but space precludes exploring them in depth; see J. Ellis, 'General Principles and Comparative Law', (2011) 22 EJIL 949, 968. Cf F.O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008) 114.

Although the principle of legality has various iterations,[87] here it is understood to mean 'no crime without law', or *nullum crimen sine lege*.[88] It could be claimed that two enlargements of the crime breached this principle: first, in *Furundzija*, the Trial Chamber included forced oral sex in the definition of rape; and, second, in *Kunarac*, the Appeal Chamber expanded the requirement of 'coercion or threat or use of force' to the absence of consent 'assessed in the context of the surrounding circumstances'. With regard to these elements, the definition of the crime in both *Furundzija* and *Kunarac* was wider than the definition of the crime of rape under the penal law of Bosnia and Herzegovina in force at the time, which covered only forcible sexual intercourse and required force or threat of force to the victim or someone 'close to her.'[89] The argument could hence be made that the ICTY in effect retroactively criminalised conduct that would not have fallen under the definition of rape in force at the time.

In *Furundzija*, it was clearly not the case that the use of domestic law constituted a breach the principle of legality. Recall that the expansive interpretation which bought oral sex under the definition of rape did *not* result from the survey of domestic law; in fact, the Trial Chamber explicitly noted that 'a major discrepancy may, however, be discerned in the criminalization of forced oral penetration'.[90] Instead, the Chamber brought oral sex under the crime of rape using a purely teleological methodology. It reasoned that forced oral sex constitutes 'a most humiliating and degrading attack on human dignity'; that the very purpose of international humanitarian and human rights law was to protect human dignity; and, *therefore*, 'it is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as

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[87] For other variants of the principle of legality, see K.S. Gallant, *The Principle of Legality in International and Comparative Law* (CUP 2009) 11-14.

[88] T. Meron, 'Remarks on the Principle of Legality in International Criminal Law', (2009) ASIL Proc. 107.

[89] *Furundžija* (Trial Chamber Judgement), fn 214 ('The Penal Code of Bosnia and Herzegovina (1988) Ch. XI states that "[w]hoever coerces a female person with whom he is not married to, into sexual intercourse by force of threat to endanger her life or body or that of someone close to her will be sentenced to between one to ten years in prison').

[90] *Furundžija* (Trial Chamber Judgement), para 182.

rape'.[91] Whilst this expansive interpretation might be critiqued, it cannot be placed at the foot of the Trial Chamber's use of domestic law.[92]

The argument has slightly more purchase with regards to the reasoning of Trial Chamber in *Kunarac*. Recall that the Chamber used domestic law to reason that absence of voluntary consent, and not just coercion or the threat or use of force, constituted the second limb of the definition of rape.[93] This departed from both the *Furundzija* definition of rape and the crime under the penal law of Bosnia and Herzegovina in force at the time. This question was pertinent because one victim, "D.B.", initiated sexual intercourse with Kunarac without coercion or the threat or use of force on his part.[94] However, evidence was presented that another soldier, "Gaga", had threatened the victim with death if she did not have intercourse with Kunarac. The defendant had therefore not used or threatened to use force or coerced the victim to have sexual intercourse with him, hence falling outside the *Furundzija* definition of rape.

However, to argue that this use of domestic law breached the principle of legality is erroneous on two counts. First, neither was a strict principle of legality recognised as a rule of international law in the pertinent period, nor was the application of such a principle acknowledged in the practice of the *ad hoc* tribunals. From Nuremberg up until the inclusion of a strong principle of legality in the Rome Statute,[95] the principle has been treated 'as a flexible principle of justice that can yield to competing imperatives ... the condemnation of brutal acts, ensuring victim accountability, victim satisfaction and rehabilitation, the preservation of world order, and

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[91] *Furundžija* (Trial Chamber Judgement), para 183.
[92] The Trial Chamber went on to pre-empt the criticism that its teleological reasoning breached the principle of legality by arguing that the acts would in any case have been considered as sexual assault under the domestic law of Bosnia & Herzegovina. As long as the defendant was sentenced on this basis, the Chamber was of the opinion that the categorization of the act was unimportant; *Furundžija* (Trial Chamber Judgement), para 184.
[93] *Kunarac* (Trial Chamber Judgement), para 460.
[94] See in particular, *Kunarac* (Trial Chamber Judgement), paras 211, 647.
[95] Articles 11, 22, 23, & 24, Statute of the International Criminal Court.

deterrence.'[96] As international criminal law has developed, what has been considered as protected by the principle of legality has evolved. This is best captured by characterising the change as a move from legality in law ascertainment in the Statute of the ICTY to legality in content determination in the Rome Statute.[97] The former encompasses the non-retroactivity in the creation of crimes, as evidenced by the limitation of the subject-matter jurisdiction of the ICTY to 'rules of international humanitarian law which are *beyond any doubt* part of customary law'.[98] The latter, on the other hand, reflects the stricter principle that crimes must be interpreted strictly, not by analogy, and in favour of the defendant.[99] The principle of legality at the time of the *ad hoc* tribunals was clearly understood in the former sense.[100] This was reflected in the practice of the tribunals, which took 'a relatively relaxed approach, much in the spirit of their predecessors at Nuremberg'.[101]

To sum, the principle of legality has been viewed as a malleable principle that has changed shape with the development of the legal regime. As noted above, 'much like the beginning of criminal law jurisprudence in common law jurisdictions, legality was originally conceived of as a flexible

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[96] B. Van Schaak, 'Legality & International Criminal Law', (2009) ASIL Proc. 101, 102; See also, A. Cassese, *International Criminal Law* (OUP 2003) 72. Cf. T. Meron, *War Crimes Law Comes of Age* (OUP 1999) 244.

[97] L. van den Herik, Presentation at the British Institute of International and Comparative Law Seminar 'Interpretation in International Law', 14 May 2015, http://www.biicl.org/documents/715_report_tgc_interpretation_in_international_law_140515.pdf; archived at https://web.archive.org/web/20151015192955/http://www.biicl.org/documents/715_report_tgc_interpretation_in_international_law_140515.pdf. Van den Herik draws the law ascertainment/content determination distinction from J. D'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished', in A. Bianchi, D. Peat & M. Windsor (eds), *Interpretation in International Law* (OUP 2015).

[98] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808,* para 34 (emphasis added).

[99] Article 22(2), Statute of the International Criminal Court.

[100] See for example, *Prosecutor v Hadzihasanovic* (Appeals Chamber Judgement) Decision on Interlocutory Appeal Challenging Jurisdiction with respect to Command Responsibility IT-01-47-AR72 (16 July 2003), para 34 (recognising that the accused must have understood 'that the conduct is criminal in the sense generally understood, without reference to any specific provision'); *Prosecutor v Delalic and others* (Trial Chamber Judgement) IT-96-21-T (16 November 1998), para 403. See also *Prosecutor v Karemera and others* (Trial Chamber) Decision on Defense's Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise ICTR-98-44-T (11 May 2004), para 43. See also, Meron, 'Comments', 108.

[101] Schabas, *The UN International Criminal Tribunals*, 63.

concept to allow for critical legal developments, even if they occurred retroactively.'[102] Whilst one might claim that a strict conception of the principle has reached the status of custom in contemporary international criminal law,[103] to claim that was the case for the *ad hoc* tribunals is a different – and quite unsustainable – proposition.[104]

Strict adherence to the principle of legality has not, then, been mandated as a rule of international law, nor did it feature in the practice of the *ad hoc* tribunals. One could nevertheless maintain that the tribunal should have narrowly interpreted the crimes within their subject-matter jurisdiction. However, to do so would be an avowedly normative argument. Such an argument would be based on the idea that the value of a strict interpretation of the principle of legality is in itself sufficiently important to override countervailing considerations of substantive justice, condemnation, and deterrence, amongst others. It would have to counter the claim that 'by subordinating the principle of [*nullum crimen sine lege*] to a vision of substantive justice, tribunals have determined that the former injustice is less problematic than the other.'[105]

What values does the principle of legality uphold that might override these considerations? Kenneth Gallant identifies four purposes of the principle: the protection of human rights of the would-be accused, increased legitimacy of the criminal system, separation of powers, and effective pursuance of the purposes of criminalisation.[106] However, none of these purposes inherently outweigh the countervailing considerations: breaching the human rights of the

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[102] Grover, *Interpreting Crimes,* 188. See also, Van Schaak, 'Legality & International Criminal Law', 102; Gallant, *The Principle of Legality*, 405.

[103] Gallant, *The Principle of Legality*, 352-404.

[104] For an interesting view on legality, tracing the differences in conceptions of the principle back to the division between international lawyers and criminal lawyers, see D. Jacobs, 'International Criminal Law', in J. Kammerhofer & J. D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 471-73.

[105] B. Van Schaak, '*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals', (2008) Georgetown LJ 119, 140. See also, Grover, *Interpreting Crimes,* 152-54. See also *Furundžija* (Trial Chamber Judgement), para 184.

[106] Gallant, *The Principle of Legality*, 20-30. See also Grover, *Interpreting Crimes*, 137-51.

accused is not inherently worse than letting a breach of the victim's human rights go unpunished, nor is it clear that the legitimacy of the international criminal system would be augmented by adherence to the principle of legality instead of advancing the battle against impunity. The argument from the separation of powers posits that it is for the legislature as the democratically elected lawmaker to determine criminal conduct in a society, not the judiciary. However, on the international plane the concept of the separation of powers is notably different to that within domestic law. Indeed, it could even be argued that the Security Council in effect delegated the task of defining certain crimes to the ICTY by including those crimes within its subject-matter jurisdiction.[107] With regard to the final justification of the principle of legality, Gallant notes that the purposes of criminalising conduct include accountability, restorative justice, and reconciliation. Each of these purposes, it might be argued, could be fulfilled not by adherence to a strict principle of legality, but rather by judicial flexibility that permitted the extension of crimes to acts that were known to be wrong (*malum in se*)[108] or to which the accused was put on notice regarding potential future criminalisation.[109]

To conclude, the argument that the use of domestic law breached the principle of legality holds no weight with regard to the classification of oral sex as rape by the Trial Chamber in *Furundzija.* In relation to the extension of the crime by the Trial Chamber in *Kunarac,* one cannot make the argument that the use of domestic law violated the principle of legality insofar as it existed as a rule of international law, nor was the reasoning of the Chamber incongruent with the general approach to legality taken by the *ad hoc* tribunals. To critique the use of domestic law would have to be based on an argument of moral values, not law, the strength of which is unclear at best.

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[107] For a similar argument, see T. Ginsburg, 'International Judicial Lawmaking', University of Illinois College of Law, Illinois Law and Economics Working Paper Series Working Paper No. LE05-006, 13-14.
[108] Gallant, *The Principle of Legality*, 41.
[109] Van Schaak, '*Crimen Sine Lege*', 167.

II. INTERPRETING IMPORTED LEGAL INSTITUTIONS

The second use of domestic law by the ICTY was to interpret legal institutions that were imported into the Statute or RPE of the Tribunal, predominantly from common law jurisdictions.[110] The first judgment handed down by the ICTY provides us with an illustrative example of such reasoning.

i. Interpreting the Guilty Plea

The defendant in that case was Drazen Erdemovic, a member of the 10th Sabotage Detachment of the Bosnian Serb Army which partook in the summary execution of 1200 Bosnian Muslim men in Srebrenica in 1995.[111] After being transferred to The Hague to give pre-trial evidence in the cases of Radovan Karadzic and Ratko Mladic, Erdemovic confessed to his participation in the Srebrenica massacre,[112] estimating that he alone had murdered about seventy men.[113] Charged with crimes against humanity and violations of the law or customs of war, [114] Erdemovic pled guilty to crimes against humanity at his first appearance before the Trial Chamber.[115] However, he qualified his plea with the following words:

> Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you are sorry for them, stand up, line up with

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[110] See also *Prosecutor v Popovic* (Trial Chamber Judgement) IT-05-88-T (10 June 2010) paras 872-74, 2122 (referring to common laws on conspiracy, as 'the concept of criminal conspiracy incorporated into the Genocide Convention derived from the common law approach...').

[111] *Prosecutor v Erdemović* (Appeals Chamber Judgement) IT-96-22-A (7 October 1997), para 1. Judgment in this case also uses domestic laws in order to establish whether duress is a complete defence under international criminal law; this is not dealt with here as it does not involve the interpretation of any provision, but rather the establishment of a general principle of law.

[112] *Prosecutor v Erdemović,* (Trial Chamber Sentencing Judgement), IT-96-22-T (29 November 1996), para 1; Schabas, *The UN International Criminal Tribunals*, 424.

[113] *Erdemović,* (Trial Chamber Sentencing), para 78.

[114] *Erdemović,* (Trial Chamber Sentencing), para 2.

[115] *Erdemović,* (Trial Chamber Sentencing), para 3.

> them and we will kill you too". I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me. That is all I wish to add.[116]

This raised the question whether equivocal guilty pleas may nevertheless be accepted as valid. Guilty pleas are not specifically provided for in the Statute of the ICTY, however Article 20(3) provides that 'The Trial Chamber shall ... instruct the accused to enter a plea'. On the other hand, Rule 62 of the RPE explicitly notes the possibility of entering a guilty plea but does not outline what constitutes a valid guilty plea.[117] Whilst the Trial Chamber accepted Erdemovic's guilty plea,[118] the Appeals Chamber raised the matter, *proprio motu*, 'of interpreting the meaning of the guilty plea as it exists within the Statute and the Rules.'[119]

The joint separate opinion of Judges McDonald and Vohrah laid out the reasoning of the majority, in which they expounded a general three-stage interpretive process.[120] First, the judges stated that interpretation should take place according to the rules laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[121] Should that prove unfruitful, the 'second step in the proper interpretation of the Statute and the rules involves a consideration of

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[116] *Prosecutor v Erdemović* (Trial Chamber Transcript) IT-96-22-T (31 May 1996), 9.

[117] Rule 62: 'The Trial Chamber shall: (iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;' At the time of Erdemovic's first trial, the applicable Rules of Procedure and Evidence were those of 5 July 1996; *Rules of Procedure and Evidence* 5 July 1996 IT/53/Rev.9.

[118] Nevertheless, the Trial Chamber, presided by a French judge, seemed to be 'uncomfortable with the whole business of guilty pleas' - a distinctly common law concept; Schabas, *The UN International Criminal Tribunals,* 424. Interestingly, the Trial Chamber recognised that pleading guilty could be 'one of the elements which constitutes...a defence strategy', thus leaving the possibility open that a Chamber may accept a guilty plea even when the defendant maintains his innocence; see *North Carolina v Alford* 400 U.S. 25 (1970); J.R.W.D. Jones & S. Powles, *International Criminal Practice* (3rd edn, OUP 2003) §8.5.257.

[119] *Erdemović* (Appeals Chamber Judgement), Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 3. Intimately bound with this issue was the question of the existence of duress as a complete defence to the murder of innocent civilians in international law – if duress existed as such, and if a guilty plea could not be equivocal, any plea that suggested that the defendant was under duress would be inadmissible.

[120] Judge Stephen agreed with Judges McDonald and Vohrah on this point; *Erdemović* (Appeals Chamber Judgement) Separate and Dissenting Opinion of Judge Stephen, para 5.

[121] *Erdemović* (Appeals Chamber Judgement), Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 3.

international law authorities' if such authorities are consistent with the 'spirit, object and purpose of the Statute and Rules'.[122] Quite what 'international authorities' meant is unclear – the term has potential to cover interpretations of analogous rules in different contexts, international jurisprudence, or even doctrinal writings that may elucidate the provision.[123] The third and final step in the judges' triad of interpretative techniques deserves quoting at length:

> In the event that international authority is entirely lacking or is insufficient, recourse may then be had to national law to assist in the interpretation of terms and concepts used in the Statute and the Rules. We would stress again that no credence may be given to such national law authorities if they do not comport with the spirit, object and purpose of the Statute and the Rules ... In our observation, there is no stricture in international law which prevents us from making reference to national law for guidance as to the true meaning of concepts and terms used in the Statute and the Rules.[124]

After expounding this approach to interpretation, Judges McDonald and Vohrah did not follow the carefully reasoned methodology just laid out. Instead, the judges placed emphasis on the common law origins of the guilty plea in the Statute of the ICTY.[125] Accordingly, they were

> of the opinion that we may have regard to national common law authorities for guidance as to the true meaning of the guilty plea and as to the safeguards for its acceptance. The expressions "enter a plea" and "enter a plea of guilty or not guilty", appearing in the Statute and the Rules which form the infrastructure for our international criminal trials *imply*

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[122] *Erdemović* (Appeals Chamber Judgement), Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 4.
[123] In *Furundzija*, however, the Tribunal seems to understand 'international law authorities' as referring to the case law of other international courts and tribunals that have dealt with analogous issues; *Prosecutor v Furundžija* (Trial Chamber Judgement) IT-95-17/1-T (10 Dec. 1998), para 177.
[124] *Erdemović* (Appeals Chamber Judgement), Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 5.
[125] *Erdemović* (Appeals Chamber Judgement), Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 6. See also Rule 15 of *Suggestions Made by the Government of the United States of America, Rules of Procedure and Evidence for the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia*; reprinted in Morris & Scharf, ICTY vol 2, 531-32.

> *necessarily*, in our view, a reference to the national jurisdictions from which the notion of the guilty plea was derived.[126]

McDonald and Vohrah continued to examine the conditions for entering a valid guilty plea in Canada, the United States, Malaysia, and England and Wales,[127] to conclude that three criteria must be met: a valid plea must be voluntary, informed and unequivocal.[128] Following this judgment, Rule 62 *bis* was adopted by the ICTY, which codified the *Erdemovic* requirements for a valid guilty plea.[129] Similarly, Rule 62 of the RPE of the ICTR was amended after delivery of the Appeals Chamber judgment to reflect the *Erdemovic* requirements for a valid guilty plea.[130]

ii. Interpreting Subpoena Powers/Binding Orders

Another instance of the use of domestic laws to interpret a transplanted legal institution is the *Blaskic* case.[131] In that case, Croatia challenged the ability of the ICTY to issue a *subpoena* to Croatia and its defence minister, compelling them to produce evidence before the Tribunal.[132]

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126 *Erdemović* (Appeals Chamber Judgement), Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 6 (emphasis added).

127 *Erdemović* (Appeals Chamber Judgement), Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras 10 – 31.

128 *Erdemović* (Appeals Chamber Judgement), Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 8.

129 ICTY, *Rules of Procedure and Evidence,* 14th Plenary Session 20 October 1997 & 12 November 1997 IT/32/Rev.12, 43-44. The requirement that a guilty plea be informed was added subsequently at the 19th Plenary Session; ICTY, *Rules of Procedure and Evidence,* 19th Plenary Session 3 & 4 December 1998 IT/32/Rev.14, 43.

130 ICTR, *Rules of Procedure and Evidence* 8 June 1998, Rule 62 <www.unictr.org/Portals/0/English%5CLegal%5CEvidance%5CEnglish%5C010698.pdf>. Cf ICTR, *Rules of Procedure and Evidence* 6 June 1997, Rule 62 <www.unictr.org/Portals/0/English%5CLegal%5CEvidance%5CEnglish%5C970606e.pdf>. Note that the ICC takes a different position to that of the *ad hoc* tribunals with regards to a guilty plea. A Trial Chamber of the ICC may accept an 'admission of guilt' or order a more complete presentation of the facts, if it considers that this is required 'in the interests of justice, in particular the interests of the victims'; ICC Statute art 65; ICC RPE Rule 139. The requirements for a valid 'admission of guilt' are nevertheless the same as those elaborated in *Erdemovic*; ICC Statute art 65(1).

131 *Prosecutor v Blaskic* (Trial Chamber), Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum* (18 July 1997).

132 Specifically, the requested evidence was 'notes and writings including military orders and directives between the Croatian Defence Ministry and the Ministry of Defence of the Croatian Community in Herzog Bosna' from the Republic of Croatia and its Defence Minister; K.A.A. Khan *et al*, *Principles of Evidence in International Criminal Justice* (OUP 2010) 580.

The ICTY has the ability to issue *subpoenas* pursuant to Rule 54 of the RPE, an elaboration of the Tribunal's powers of discovery under Article 19 of the Statute,[133] which provides that the ICTY 'may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.'[134]

A Trial Chamber of the ICTY adduced domestic law in response to two ambiguities:[135] first, when is a *subpoena* deemed to be 'required' for a trial, and hence fall under the Tribunal's Article 19/Rule 54 power? Second, may the Tribunal review states' claims that the requested evidence is subject to national security privilege, relieving the state from the obligation to hand over the evidence? With regards to the former, the Chamber stated that 'there is little guidance to be found discussing that which is "required" for trial' in the documents related to the establishment of the Tribunal.[136] The Chamber continued

> Although the use of the term "subpoena" by the International Tribunal does not incorporate its full meaning as expressed in any national system, because the common law provides for the issuance of subpoenas, it is appropriate to look at the manner in which they are utilized in common law systems as well as its limitations.[137]

The Trial Chamber proceeded to review the law of the U.S., England, Malaysia, the Iran-U.S. Claims Tribunal, and the ECJ to conclude that a *subpoena* is to be considered necessary only to if the information requested pertains to the charge being investigated and is 'limited to that which

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[133] Article 19(2) provides that 'Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.'

[134] The stipulation that an order be 'required' stems from the wording of Article 19(2) of the ICTY Statute.

[135] The Trial Chamber grounded the ICTY's ability to issue *subpoenas* to states on the basis of Article 29 of the ICTY Statute, and to individuals on the basis that it was necessary to fulfill the function of the Tribunal; *Blaskic,* Decision on Subpoenae Duces Tecum, paras 66, 81, 86

[136] *Blaskic,* Decision on Subpoenae Duces Tecum, para 98.

[137] *Blaskic,* Decision on Subpoenae Duces Tecum*,* para 99.

is relevant, necessary, or in some cases, desirable.'[138] In U.S. and English law, the question of what is necessary is not dealt with at the time of issuance of the order, but is typically confronted in response to a challenge from the subject of the subpoena.[139] In the opinion of the Chamber, '[s]imilar procedures should apply in the International Tribunal' in order to avoid the 'unnecessary' and inefficient task of attempting *a priori* to determine what evidence was to be considered necessary.[140]

In relation to the claim that the Tribunal must defer to Croatia's invocation of national security privilege, the Trial Chamber once again drew on domestic law in the interpretation of its Rule 54 powers.[141] It surveyed cases from the U.S., the U.K., Canada, Pakistan, Yugoslavia, and Australia, as well as analogous international jurisprudence, all of which provided for the review of national security claims by the courts.[142] The Chamber concluded that it is for the Tribunal, in closed session if appropriate, to determine whether the requested evidence should be exempt from the discovery powers of the Tribunal.[143]

The decision of the Trial Chamber was challenged by Croatia before the Appeals Chamber three months later.[144] The Appeals Chamber took a different approach to that of the Trial Chamber, rejecting the utility of recourse to domestic law to interpret Rule 54, which will be examined below. Instead, it noted that Article 29 did not provide any exceptions to states' obligation to

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[138] *Blaskic,* Decision on Subpoenae Duces Tecum, para 100.
[139] *Blaskic,* Decision on Subpoenae Duces Tecum, para 104.
[140] *Blaskic,* Decision on Subpoenae Duces Tecum, para 105.
[141] 'In view of the inconclusive nature of the existing jurisprudence in international law, an examination of the question of whether national courts have authority to review claims of national security may provide some guidance'; *Blaskic,* Decision on Subpoenae Duces Tecum, para 140.
[142] *Blaskic,* Decision on Subpoenae Duces Tecum, paras 141-46.
[143] *Blaskic,* Decision on Subpoenae Duces Tecum, para 149.
[144] *Prosecutor v Blaskic* (Appeals Chamber) Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997).

comply with orders of the Tribunal, and that to hold otherwise would jeopardize the very functioning of the Tribunal.[145]

Following the *Blaskic* case, the ICTY adopted a new rule, Rule 54 *bis,* codifying the procedural requirements that had been elaborated by the Trial and Appeals Chambers, including the obligation for parties submitting a subpoena request to specific why it is 'necessary for a fair determination of that matter'[146] and the procedures to be followed if a state invokes national security privilege.[147]

iii. Lost in Translation? (or: The Extent to which an International Criminal Court can rely upon National Law for the Interpretation of International Provisions)

The use of domestic law by the Appeals Chamber in *Erdemovic* and the Trial Chamber in *Blaskic* was criticised in the dissenting opinion of Judge Cassese and the judgment of the Appeals Chamber respectively. The main criticism advanced was that criminal tribunals should be wary of importing institutions from domestic law without appropriate modifications to account for the specificities of ICL.[148] Does this argument convincingly provide a principled reason to reject the use of domestic law?

In *Erdemovic,* Judge Cassese, in a discussion entitled 'The Notion of a Guilty Plea (or: The Extent to which an International Criminal Court can rely upon National Law for the Interpretation of International Provisions)', argued that domestic law could only be drawn upon if the international instrument expressly stated that such recourse was permissible, or if reference to

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[145] *Blaskic,* Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber, para 47.

[146] Rule 54*bis*(A)(ii), ICTY RPE (7 December 1999), IT/32/Rev. 17.

[147] Rule 54(F), ICTY RPE (7 December 1999), IT/32/Rev. 17.

[148] See also, F. Mégret, 'Beyond "Fairness": Understanding Determinants of International Criminal Procedure', (2009) 14 UCLA Journal of International Law and Foreign Affairs 37. Cf *International Status of South-West Africa*, Advisory Opinion, [1950] ICJ Rep. 128, 148 (separate opinion of Lord McNair).

domestic laws was necessarily implied by the 'very nature and content of the concept' (such as determination of nationality for the purposes of diplomatic protection).[149] His main contention was that *prima facie* similar concepts in international criminal law were hardly ever identical to those in domestic criminal law: international criminal law had a different focus and applicability, was a fusion of civil and common law systems, and faced challenges and issues specific to a supra-national criminal tribunal.[150] Those that used domestic laws to interpret the provisions of the Statute or RPE too readily, he argued, were not cognisant of these potential incongruities.[151]

Similarly, in *Blaskic*, the Appeals Chamber – presided by Cassese – reprimanded the Trial Chamber for the use of 'domestic analogy':

> The Appeals Chamber wishes to emphasise at the outset that the Prosecutor's reasoning, adopted by the Trial Chamber in its Subpoena Decision, is clearly based on what could be called "the domestic analogy"... The setting is totally different in the international community ... the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension. In addition to causing opposition among States, it could end up blurring the distinctive features of international courts.[152]

Instead of recourse to domestic law, Cassese and the Appeals Chamber were of the view that the object and purpose of the provision must be the starting point for an interpretive enquiry, and it

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[149] *Erdemović* (Appeals Chamber Judgement), Separate and Dissenting Opinion of Judge Cassese, para 3.
[150] *Erdemović* (Appeals Chamber Judgement), Separate and Dissenting Opinion of Judge Cassese, para 3 – 5.
[151] For a defence of this view, see H. van der Wilt, 'Commentary', in A. Klip & G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals* vol. 1 (Hart 1999) 654.
[152] *Blaskic,* Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber, para 40.

was on this basis that their interpretations of the guilty plea and Rule 54 were based.[153] However, this is where the argument against the use of domestic laws starts to unravel.

The fact that the institution has been imported into the Statute or RPE in the first place suggests that the object and purpose it served in domestic law were identified as responding to a need of the Tribunal. The function or purpose of the institution in domestic law – in the case of the guilty plea, the increased efficacy offered to the penal system[154] – is the very reason that the institution was included in the Statute in the first place. As a result, the object and purpose of the provision in the Statute cannot help but be informed by its domestic law origins.

This is aptly illustrated by the fact that Cassese concluded that the same three criteria for a valid guilty plea identified by the majority in *Erdemovic* were applicable 'by virtue of a contemplation of the unique object and purpose of an international criminal court and the constraints to which such a court is subject [namely, to respect the rights of the accused under Article 21 of the Statute], rather than by reference to national criminal courts and their case law.'[155] In this case, at least, the specificity of the international criminal justice system did not call for a different solution to that adopted by domestic systems. The claim of 'exceptionalism' of the ICTY therefore seems overstated.

Moreover, the criticism of the Appeals Chamber in *Blaskic* is misplaced. In the above-cited paragraph that chastised the approach of the Trial Chamber, the Appeals Chamber made reference to various paragraphs of the Trial Chamber judgement to support their point. However, none of these references pointed to paragraphs in which the Trial Chamber had made

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[153] *Erdemović* (Appeals Chamber Judgement), Separate and Dissenting Opinion of Judge Cassese, para 8; *Blaskic,* Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber, para 47.
[154] *Erdemović* (Appeals Chamber Judgement), Separate and Dissenting Opinion of Judge Cassese, para 8.
[155] *Erdemović* (Appeals Chamber Judgement), Separate and Dissenting Opinion of Judge Cassese, para 10.

reference to domestic law.[156] The points in which the Trial Chamber did make reference to domestic law – specifically, the circumstances under which a *subpoena* can be issued,[157] the exception of matters of national security concerns,[158] and whether the tribunal or the state determines the legitimacy of a national security claim[159] – were not the subject of direct criticism in the judgment of the Appeals Chamber.[160] The Trial Chamber established the authority to issue binding orders to state officials – the focus of the Appeals Chamber – on the basis that such powers were necessary for the Tribunal to effectively undertake its task, not on the basis of a domestic analogy. The extent to which this criticism had any substance, then, is questionable.

To conclude, the ICTY has had recourse to domestic laws in order to interpret legal institutions imported from domestic law, predominantly of a procedural character. The very fact that these institutions were transposed into the Statute and Rules of the Tribunal suggests that they responded to a perceived need of the Tribunal. Domestic laws have been used to inform how the institution should function in its host environment in order for it to fulfil the object and purpose for which it was transposed. The arguments against such reference to domestic law by Judge Cassese in *Erdemovic* and the Appeals Chamber in *Blaskic* are unconvincing.

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[156] *Blaskic* (Appeals Chamber Judgement) Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber, para 40; citing *Blaskic,* Decision on Subpoenae Duces Tecum, paras 67-69.

[157] *Blaskic,* Decision on Subpoenae Duces Tecum, paras 99-101.

[158] *Blaskic,* Decision on Subpoenae Duces Tecum, paras 123-26.

[159] *Blaskic,* Decision on Subpoenae Duces Tecum, paras 142-46.

[160] The corresponding parts of the Appeals Chamber judgement are *Blaskic* (Appeals Chamber Judgement) Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber, paras 32 (scope of a binding order); 61 (national security exceptions); 67 (Tribunal determines legitimacy of national security exceptions).

III. Filling Gaps in a New Chapter in International Criminal Law

The sections above have described two uses of domestic law by the ICTY: the first to define the crime of rape; the second to interpret institutions imported into the Statute and RPE of the ICTY from domestic law. In both cases, it was argued that the principled objections against the use of domestic law – the legality argument and the exceptionalism argument – do not preclude the use of domestic law. In the absence of a principled argument against its use, this section moves to evaluate the use of domestic law in the framework of legitimacy outlined in the previous chapter.

In Chapter Three, a tri-partite definition of legitimate interpretation was elaborated, comprising interpretive authority, procedural justice, and shared values. It is within this framework that the use of domestic laws will be assessed. The acceptability of the use of domestic law by the ICTY turns on the third element of legitimacy elaborated in the previous chapter; namely, the congruity of the interpretations with the values underpinning the establishment of the ICTY.

i. Interpretive Authority and Procedural Justice

Before this, however, we must examine the first two elements of legitimacy; namely, did the ICTY have interpretive authority, and did it abide by the rigours of procedural justice? With regard to the first question, an argument composed of two stages could be advanced to support the claim that there is a duty to obey the interpretive decisions of the ICTY.

First, it could be argued that the duty to obey the interpretations of the ICTY stems from the authority vested in it by the Security Council. Recall that the ICTY was established as a subsidiary body of the Security Council under Chapter VII by virtue of Resolution 827 (1993).

Articles 25 and 48(2) of the UN Charter provide that UN members have an obligation to act in accordance with decisions of the Security Council made pursuant to the provisions of the Charter. The argument would run as follows: UN members vested a broad authority in the Security Council to create subsidiary bodies if deemed necessary to the maintenance of international peace and security; the Security Council exercised this authority when creating the ICTY, and, hence, states in effect have consented to recognise the authority of the ICTY.

In the previous chapter, consent was identified as the heart of the duty to obey. But what have the UN members consented to exactly? Presumably, they did not explicitly consent to recognise the interpretations advanced by subsidiary judicial bodies of the Security Council as authoritative;[161] rather, it was the broad power vested in the Security Council that permitted the creation of a *judicial* subsidiary body. This necessarily entails accepting what have been called the 'inherent powers' of courts and tribunals.[162] The most commonly accepted of these powers is the ability of a court or tribunal to determine its own jurisdiction, often referred to as *Kompetenz-Kompetenz*, but also extends to the ability of courts and tribunals to make such rules of procedure as are required by the judicial function.[163] If it has been recognised that courts and tribunals have the inherent power to interpret the jurisdictional provisions of their constitutive documents, as

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[161] One question raised in the pre-trial stage of the *Tadic* case was whether the Security Council actually had authority to create a judicial subsidiary body, which it answered in the affirmative; *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-AR72 (2 October 1995), paras 32-38. This conclusion is reinforced by the fact that all 15 members of the Security Council, as well as Bosnia & Herzegovina, explicitly supported the creation of the ICTY; see *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 56; Morris & Scharf, ICTY vol. 1, 47-48. One could also include states that made specific suggestions regarding the functioning of the Tribunal as those that recognised the ability of the Security Council to create a judicial subsidiary body; *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808*, para 13. The ability of the Security Council to create a subsidiary judicial body was, however, controversial; see for example A.P. Rubin, 'An International Criminal Tribunal for the former Yugoslavia?', (1994) 6 Pace International Law Review 7, 8.

[162] I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 166 ('The presumption is that, by consenting to create a court or tribunal, States also consent to such necessary inherent powers.'); see also, Separate Opinion of Judge Higgins, *Legality of the Use of Force (Serbia and Montenegro v Spain)* (Preliminary Objections) [2004] ICJ Rep. 1214, 1216-17.

[163] C. Brown, *A Common Law of International Adjudication* (OUP 2007) 60-64.

well as create new procedural rules, it is *a fortiori* the case that tribunals have the power to interpret their constitutive document.[164] By delegating authority to the Security Council to establish subsidiary bodies, UN members also implicitly consented to the inherent powers of tribunals, including the ability to interpret its own constitutive document and rules of procedure.

In relation to the second element of legitimacy, procedural justice, the basic procedural guarantees included in Article 14 of the International Covenant on Civil and Political Rights were included in Article 21 of the Statute of the ICTY.[165] These guarantees comprise the elements outlined in the list of Jeremy Waldron in the previous chapter, such as the right to representation by a legally trained advocate, the right to be present at trial, and the right to cross-examination. The ICTY therefore meets the basic elements of procedural justice that were identified as vital to the legitimacy of an interpretation by an international court or tribunal.[166]

ii. The Values Underpinning the ICTY

The legitimacy of the interpretations examined above pivots around the third element of legitimacy; shared values. The values underpinning the creation of the ICTY are easy to discern by virtue of its formation under the auspices of an international organization in which the views of members, the Security Council, and the Secretary General were all aired. In essence, the values motivating the formation were two-fold: to hold to account persons responsible for serious violations of IHL; and, importantly, to do so via judicial – as opposed to political – means.[167] This is aptly demonstrated by statements made in the debate leading up to and following the

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[164] Cf. Van Damme, *Treaty Interpretation,* 208.

[165] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808*, para 106.

[166] The argument that the interpretations in *Furundzija* and *Kunarac* breached the principle of legality has been addressed above and will not be recapitulated here.

[167] See also, Article 2, ICTY Statute; *Prosecutor v Aleksovski* (Appeals Chamber Judgement) IT-95-14/1-A (24 March 2000), para 101.

adoption of Security Council Resolution 808 (1993), most eloquently formulated by the Spanish representative to the Security Council:

> [T]he establishment of an international criminal tribunal ... fulfils its dual objective of meting out justice and discouraging such grave violations in the future, we believe that this undertaking is so important and so sensitive that it is necessary to ensure the maximum respect for legal rigour in its functioning.[168]

Similar sentiments were expressed three months later in the debate surrounding Resolution 827 (1993), which established the ICTY. The representative of New Zealand, for example, stated that

> [I]t is imperative that persons responsible for acts of "ethnic cleansing", the forced expulsion of people, systematic rape, torture and murder are brought to trial and punishment ... We must remember, however, that the Tribunal is a court. Its task is to apply independently and impartially the rules of customary international law and, we believe, conventional law applicable...[169]

As noted at the start of this chapter, the ICTY was faced with a 'barebones' statute, no RPE, and scant international criminal precedent from the post-World War Two international military tribunals and courts. When one takes this into account, the two values identified above clearly come into tension. The desire to punish those guilty of atrocities in accordance with the rule of law does not sit easily with an underdeveloped legal system. One must admit that either the tribunal will not be able to function adequately for want of a fully-fledged set of legal rules, or

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[168] *Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-Fifth Meeting of the Security Council*, 22 February 1993, S/PV.3175, reprinted in Morris & Scharf, ICTY vol 2, 173. See also the statements of the representative of the U.S., the U.K., and New Zealand.

[169] *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting of the Security Council,* 25 May 1993, S/PV.3217, reprinted in Morris & Scharf, ICTY vol 2, 179. See also the statements by the representatives of Japan, Morocco, and Russia.

that the judges take steps – including reference to extra-systemic law – to create a legal system that is fit for purpose.

iii. Domestic Law as the Interpretive Aid of Last Resort

The ICTY took the latter approach, which enabled application of the law, hence fulfilling the 'punishment' function of the tribunal, whilst still abiding to the fullest extent possible by the rule of law. The utility of this is evident if we consider some counter-factual scenarios. Faced with an insufficiently defined law or rule, what alternative options would be open to the tribunal?

First, the tribunal could refuse to apply the law for want of specificity, whether that pertains to a crime over which it has subject-matter jurisdiction (such as rape) or a procedural rule (such as a guilty plea). Alternatively, the tribunal could interpret and apply the rule without having recourse to domestic law. If it took the latter option, what would the tribunal use as an interpretive aid in the absence of domestic law? In *Furundzija*, the Trial Chamber was faced with a dearth of any useful materials to which to refer when interpreting rape: neither conventional or customary law, nor general principles of international criminal law or international law were of any assistance.[170] Presumably, then, in order to interpret and apply the crime of rape without having recourse to domestic law, the judges would be forced to exercise their purely subjective judgment as to which elements constituted rape. Similarly, in *Erdemovic* and *Blaskic*, there were no direct analogues or precedents in international criminal procedure upon which to draw to the imported legal institutions. As a result – and as demonstrated by Cassese's dissenting opinion in *Erdemovic* – without recourse to domestic law, judges would be left to fall back on subjective imputations of the purpose of the imported legal institution. Domestic law was the interpretive aid of last resort.

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[170] *Furundzija* (Trial Chamber Judgement), para 177.

One could argue that the rules of procedure of the IMT and IMTFE provided a precedent that the tribunal could draw on. However, the limited utility of this precedent was recognised at an early stage by Antonio Cassese himself in his capacity as the first President of the ICTY charged with elaborating the RPE. He noted that 'we have had very little in the way of precedent to guide us. The two other international criminal tribunals that preceded us, at Nuremberg and Tokyo, both had very rudimentary rules of procedure ... we have made a conscious effort to make good the flaws of Nuremberg and Tokyo.'[171]

Neither of the abovementioned alternative scenarios seems congruent with the values that underpin the ICTY. In the first case, the tribunal would abdicate its function of adjudicating alleged crimes over which it has subject-matter jurisdiction. Clearly, such an approach would impact on the ability to bring those accused of serious violations of IHL to justice, impeding the tribunal's ability to fulfil its primary function, if not rendering it impossible. Moreover, the tribunal would arguably contravene the provisions of its own statute if it refused to apply the law for want of specificity, thereby denying that it had the 'power to prosecute persons' charged with serious violations of IHL.[172] In the second hypothetical, the idea that interpretations should be determined by the whim of the judge instead of by reference to potentially relevant external material is hard to square with the avowed purpose of the Tribunal to be a court of law and not a forum of 'victors justice' in which certain conceptions of the right and good are foist on the accused by those in power.[173]

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[171] *Statement by the President of the ICTY Made at a Briefing to Members of Diplomatic Missions* (11 February 1994), IT/29, reprinted in Morris & Scharf, ICTY vol 2, 649.

[172] Article 2, Statute of the ICTY; see also Article 23, Statute of the ICTY ('The International Tribunal *shall* pronounce judgements...' (emphasis added)).

[173] See the statement by the representative of the U.S. after the adoption of Resolution 808 (1993); *Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-Fifth Meeting of the Security Council*, 11.

It is at this intersection that domestic law played a role. Faced with an insufficiently defined rule, but still required to mete out justice as a court of law, the ICTY used the only external material that was available to it which was relevant to the provisions being interpreted: domestic law. This allowed the judges to ground their reasoning in an external source, demonstrating that the interpretation was not a simple transposition of their own moral values.[174] Domestic laws were used a tool of last resort that allowed the tribunal to thread a via media between indeterminacy and the radical subjectivity that awaited without recourse to external material.

Admittedly, the methodology of the ICTY was imperfect.[175] As a nascent tribunal that was initially underfunded and understaffed, the inability of the bench to carry out exhaustive comparative research is unsurprising.[176] More extensive, representative, and thorough comparative surveys of domestic law would have been ideal. However, perfect is the enemy of good, and the validity of the argument defending the use of domestic law does not rest on the comprehensiveness of the survey conducted. Instead, this section has argued that domestic law was *the only* interpretive material that allowed the tribunal to fulfil the two values that underpinned its creation: prosecution of serious violations of IHL, within a judicial system constrained by the rule of law.

To conclude, the use of domestic law by the ICTY in the cases examined above was considered legitimate by most commentators and by the international community because it was the only interpretation available to the tribunal that partially fulfilled the values of both prosecuting serious violations of IHL and acting as a court of law. Through this example, we can appreciate

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[174] Cf. Van Schaak, *Crimen Sine Lege*, 167 (arguing that the ICTY considered domestic law as 'sufficiently robust to provide notice to the defendant of a novel construction of ICL.')

[175] Ellis, 'General Principles and Comparative Law', 968.

[176] In a private conversation, the intern at the ICTY charged with carrying out comparative research for the case of *Erdemovic* stated that the 18 jurisdictions surveyed was the totality of the domestic criminal law books in the ICTY library at the time.

the context-dependence of legitimacy; it was only because the ICTY was faced with a blank slate in terms of crimes, modes of responsibility, and procedure, that domestic law was accepted as an interpretive aid.

iv. Domestic Law as System Building

A corollary of this approach was that the use of domestic law by the ICTY built new precedents in international criminal law that could then be relied on as building blocks for the nascent regime. As time went on, chambers no longer were faced with novel interpretive questions without precedent that required reference to extra-systemic law. Instead, a system of reference to previous decisions of the Tribunal was formed along the same lines as the common law system of precedent, augmenting the legal certainty and predictability of international criminal law.[177] The use of domestic law provided a basis from which subsequent elaborations or amendments could commence.

As noted in relation to rape, the guilty plea, and binding orders, each use of domestic law has left its legacy in contemporary international criminal law. Perhaps the greatest impact has been the elaboration of rape by the *Furundzija* Trial Chamber, which – as noted above – was used as the basis for the elaboration of the crime in the Elements of Crimes of the ICC. This was found to be 'particularly persuasive because its definition of rape was based on a survey of municipal rape law and thus came with the authority of timeliness and neutrality.'[178] Similarly, the holdings of both the *Erdemovic* and *Blaskic* judgments subsequently were incorporated into revisions of the RPE.[179] In the latter cases, it might be said with some confidence that such elaboration was, at some point, inevitable; however, in the case of rape, it is unclear if the deep cultural divisions

[177] *Aleksovski* (Appeals Chamber Judgement) paras 107-11.
[178] Boon, 'Rape and Forced Pregnancy under the ICC Statute', 646.
[179] Rule 62 *bis,* RPE ICTY (*Erdemovic*); Rule 54 *bis*, RPE ICTY (*Blaskic*).

that marked the Rome conference would have been outcome were the precedent of *Furundzija* not in existence.

This defence of the use of domestic law does not fall within the framework of legitimacy – an interpretation is no more legitimate because it has a lasting impact. Nevertheless, it helps us understand the system-building nature of the ICTY's use of domestic law. It shows the evolution of the regime from a situation in which domestic law was required for the system to function, to the integration of these interpretations into rules and precedent within a more mature legal regime.

CONCLUSION

The ICTY has frequently drawn on domestic law in the interpretation of its skeleton Statute and its Rules of Procedure and Evidence. In this chapter, three illustrative examples have been given: the interpretation of the crime of rape, the interpretation of the guilty plea, and the interpretation of the power to issue *subpoenas* or binding orders. It has been argued that the arguments against the use of domestic law – the argument from the principle of legality and from 'exceptionalism' – do not convincingly make the argument that domestic law should not be used. Rather, these judgments and decisions must be seen in the context in which they were made. The majority of cases examined date from the first few years of operation of the Tribunal and all were amongst the first cases to deal with the issue for which domestic laws were invoked to interpret. Against the backdrop of a sparsely populated corpus of international criminal law and procedure, drawn solely from the practice of the IMTs, Council Control Law No. 10 courts, and domestic courts,

the Tribunal was forced to, 'by its very nature, [advance] the development of international criminal law and procedure.'[180]

It is with this in mind that the legitimacy of use of domestic law has been analysed in this chapter. Domestic law was the only interpretive aid that allowed the two values underpinning the creation of the ICTY – punishment of IHL by a judicial institution bound by the rule of law – to be fulfilled. If domestic law had not been used, the tribunal would be forced either to refuse to apply rules for want of specificity, or take a radically subjective approach whereby the judges interpret with no reference to external materials. Both of these approaches would be more injurious to the values underpinning the ICTY than the use of domestic law. In the specific context in which the ICTY was operating, the use of domestic law is to be regarded as legitimate.

The use of domestic law by the ICTY is characterised by the blank slate against which it was operating. The next chapter examines another, and altogether rather different, use of domestic law in interpretation: the interpretation of standards of behaviour by the European Court of Human Rights.

[180] *Blaskic,* Decision on Subpoenae Duces Tecum, para 153

5.

DOMESTIC LAW AS STANDARDS OF CONDUCT: THE EUROPEAN COURT OF HUMAN RIGHTS

INTRODUCTION

The European Convention on Human Rights and Fundamental Freedoms (ECHR, or "the Convention") was adopted in 1950 by 12 member states of the Council of Europe, and entered into force three years later.[1] The Treaty was a direct response to World War II,[2] which aimed to give effect to the rights enounced in the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948.[3] The Convention and its associated 14 Protocols protect mainly the civil and political rights of citizens of the member states of the Council of Europe. These rights are enforceable by judicial procedure under Articles 33 and 34 of the Convention, which provide the European Court of Human Rights (ECtHR, or "the Court") with jurisdiction over inter-state disputes and applications from aggrieved individuals, respectively.[4]

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, 213 U.N.T.S. 221 (ECHR).

[2] B. Rainey et al., *The European Convention on Human Rights* (6th ed., OUP 2014) 3.

[3] See Preamble, alinea 2, ECHR.

[4] Prior to the entry into force of Protocol 11, which created a single full-time Court, two organs - the European Commission of Human Rights and the European Court of Human Rights - were entrusted to 'ensure the observance of the engagements undertaken by the High Contracting Parties' (former art. 19 ECHR). The former Commission received initial complaints, and - if it found the complaint to be admissible - produced a report on the matter. If this did not result in settlement of the matter within three months of transmission of the report to the Committee of Ministers, the application could be referred to the Court for judicial determination (former arts. 47-49 ECHR).

It has been said that many of the rights enumerated in the Convention are 'general, vague and often uncertain as to their import.'[5] However, this has not prevented cases from being brought to the Strasbourg court; indeed, the Convention and Court have been called 'the most effective human rights regime in the world.'[6] Since its establishment in 1959, the Court has delivered over 17,000 judgments, finding violations in 83% of cases.[7] Unsurprisingly, then, the practice of the Court is a veritable treasure-trove for the interpretive methodologist.

The Court has a long heritage of referring to the domestic laws of states parties to the ECHR. Most commonly carried out under the rubric of the 'consensus doctrine', domestic laws are often referred to in order to ascertain the existence or absence of a common approach amongst Council of Europe members on a certain issue: for example, the legal recognition of transsexuals, the criminal prohibition of homosexual acts, or the rights of conscientious objectors to military service. Broadly speaking, the existence of consensus will push the Court towards an interpretation that is in line with the prevailing approach amongst contracting states, whereas the absence of consensus will result in deference to the respondent state.[8] Academic commentary on the use of consensus has been divided, with some authors claiming that consensus obfuscates the values that underpin the decision making of the Court, whilst others argue that consensus augments the legitimacy of the judgments that the Court delivers by grounding their decisions in the conduct of the society that it regulates.

A myopic focus on attempting to rationalise the use of consensus obscures why the Court uses comparative law. A fresh insight is to be gained by approaching the question from a different

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[5] J.L. Murray, 'Consensus: concordance, or hegemony of the majority?' in European Court of Human Rights, *Dialogue between judges* (Council of Europe 2008) 41.

[6] A. Stone-Sweet & H. Keller, 'The Reception of the ECHR in National Legal Orders', in H. Keller & A. Stone-Sweet (eds), *A Europe System of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008) 3.

[7] European Court of Human Rights, *ECHR: Overview 1959-2013* (Council of Europe 2014) 3.

[8] On evolutionary treaty interpretation generally, see E. Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014).

perspective; namely, a focus upon the character of the treaty obligation being interpreted. Viewing the use of domestic law in this light facilitates an understanding of how the use of comparative law increases the legitimacy of the Court. The majority of cases in which domestic laws are referred to pertain to the interpretation of legal standards of conduct or justification;[9] for example, what is 'necessary in a democratic society', 'proportionate', or 'duly diligent'. These standards are inevitably embedded in the society to which they refer. Whilst the fictional passenger on the Clapham omnibus represents the anthropomorphised standard of conduct expected of a member of society in English law,[10] the standards accepted amongst Council of Europe member states – as manifested in their domestic law – are both more accessible and more verifiable than societally accepted standards within domestic jurisdictions. Refusal to engage with the standards enshrined in domestic law by Council of Europe member states is injurious to the legitimacy of the Court.

This chapter is composed of four sections. The first section outlines the use of comparative law within the consensus doctrine by the Court, noting the purported incoherence of the doctrine. The second section examines judgments of the Grand Chamber in the ten-year period 2005-2015 in order to ascertain how the Chamber has used comparative law. It demonstrates that in the vast majority of cases, comparative law is adduced in relation to 'standards of conduct'. The third section moves to address both methodological and substantive arguments that have been made against the use of comparative law, as well as addressing the arguments of those that support its use. The final section assesses the Court's use of comparative law within the legitimacy framework elaborated in Chapter 3. It argues that in relation to standards of conduct, the Court cannot but have reference to what is actually accepted by contracting parties as

[9] In this chapter, I will refer to standards of behaviour or justification collectively as 'standards of behaviour'.
[10] *Healthcare at Home Limited v. The Common Services Agency* [2014] UKSC 49, para 12 (*per* Lord Reed).

necessary or proportionate or fair. To do otherwise would violate the fundamental principle of subsidiarity, which underpins the judicial mechanism of the Convention.

I. The Consensus Doctrine

For almost forty years, the Court has acknowledged the import of the 'practice of European States reflecting their common values' when interpreting the Convention, in order to render the protection given by the Convention effective in light of the prevailing social and political conditions.[11] The 'practice of European States' in this sense means the domestic laws and international legal obligations of states, which are presumed to manifest the contemporary values of those within members of the Council of Europe. The comparative analysis of these elements is frequently called the 'doctrine of consensus'.[12] In keeping with the focus of this thesis, the remit of this chapter is limited to the use of domestic law by the Court.[13]

Consensus often 'constitutes the primary determining factor as to whether a right is one protected by the Convention',[14] enabling the Court to strike the 'delicate balance between national sovereignty and international obligation.'[15] In the years since the three pioneering

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[11] *Demir and Baykara v Turkey*, 12 November 2008, App. No. 34503/97, para 85. For an examination of the relationship between the Strasbourg court and national courts more generally, see P. Mahoney, 'The Relationship between the Strasbourg Court and the National Courts', (2014) 130 LQR 568.

[12] The use of the terms 'comparative analysis' and 'comparative method' in relation to the ECtHR have been criticized on the basis that 'there appears to be little analysis and even less method involved'; P.G. Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights', (1998) 73 Notre Dame Law Review 1217, 1219, fn. 8. See also, P. Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law', in G. Canivet *et al.*, *Comparative Law before the Courts* (BIICL 2005) 149.

[13] For a typology of other forms of consensus, see K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 39-55.

[14] J.L. Murray, 'Consensus: concordance, or hegemony of the majority?' in European Court of Human Rights, *Dialogue between judges* (Council of Europe 2008) 27.

[15] R. St. J. MacDonald, 'The Margin of Appreciation', R. St. J. MacDonald *et al., The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 123.

consensus cases of *Tyrer*,[16] *Marckx*[17] and *Dudgeon*,[18] the Court has had frequent recourse to consensus analysis in the interpretation of a wide range of Convention rights,[19] normally with the effect that 'where there is no European consensus, the margin of appreciation will be wider ... [and] where the Court affirms the existence of European consensus, the margin of appreciation will narrow, and the Court will proceed to an evolutive interpretation of the Convention and as a rule will find a violation.'[20]

A clear demonstration of the 'orthodox effect' of consensus is the case of *M.C. v Bulgaria.*[21] In that case, the victim of an alleged incident of rape brought a case before the Court claiming that Bulgaria had failed to fulfil its positive obligations under Articles 3 and 8 by failing to pursue prosecution of her attackers. The Court acknowledged that member states enjoyed a 'wide margin of appreciation' in ensuring adequate protection against rape, but this diminished in line with 'any evolving convergence as to the standards to be achieved'.[22] On the basis of comparative surveys carried out by the Court and an NGO, Interights,[23] which demonstrated a

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[16] *Tyrer v U.K.*, 25 April 1978, no. 5856/72. In *Tyrer,* the Court said that 'the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.' *ibid,* para 31. This was the first time in which the Court referred to the Convention as a 'living instrument' - a phrase that perhaps came from a paper presented by Max Sørensen at the 1975 ECHR colloquium; E. Bates, *The Evolution of the European Convention of Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 329.

[17] *Marckx v Belgium*, 13 June 1979, no. 6833/74. *Marckx* reaffirmed the living instrument approach taken in *Tyrer,* placing importance on the recognition by contracting parties of the equality of children born into and out of wedlock.

[18] *Dudgeon v U.K.*, 22 October 1981, no. 7525/76. In *Dudgeon,* the acceptance of homosexual practices in the 'great majority of the member States of the Council of Europe' led the Court to the conclusion that 'it is no longer considered to be necessary or appropriate to treat homosexual practices' as criminal conduct; *ibid*, para 60.

[19] L. Wildhaber *et al.,* 'No Consensus on Consensus? The Practice of the European Court of Human Rights', (2013) 33 Human Rights LJ 248, 257.

[20] Wildhaber *et al.,* 'No Consensus on Consensus?', 250. For examples of the Court interpreting in line with consensus, see *M.C. v Bulgaria*, 4 March 2004, App. No. 39272/98, paras 154-55; *Vo v France*, 8 July 2004, App. No. 53924/00, para 82.

[21] *M.C. v Bulgaria*, 4 March 2004, App. No. 39272/98.

[22] *M.C.*, paras 154-155.

[23] *M.C.*, paras 88-108 (Court study surveying Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Slovenia, the U.K., and also cases from the ICTY, a Recommendation of the Committee of

'universal trend' towards recognising lack of consent as the basis of the crime of rape, the Court stated that

> [A]ny rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances [as was claimed to be *de facto* the case in Bulgaria], risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.[24]

It is clear, however, that consensus is not dispositive of a particular interpretation: the Court has ruled against the consensus approach on a number of occasions, determining that countervailing considerations – such as the state's prerogative to ascertain public morals – outweigh the importance of adopting the consensus approach.[25] Consensus hence provides a rebuttable presumption that the Court will adopt an approach in line with the majority of Council of Europe states.[26]

This lack of clarity regarding the weight given to consensus has resulted in criticism of the Court's use of consensus: in the words of one national judge, it is 'sometimes positive,

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Ministers of the Council of Europe, and a Recommendation of the UN Committee on the Elimination of Discrimination against Women), 130-147 (Interights study surveying Belgium, Denmark, Ireland, the U.K., the U.S., Australia, Canada, and South Africa).

[24] *M.C.*, para 166. The Court did 'also note' that 'the member States of the Council of Europe, through the Committee of Ministers, have agreed that penalising non-consensual sexual acts, "[including] in cases where the victim does not show signs of resistance", is necessary for the effective protection of women against violence'; *ibid*, para 162. On the question of inferring lack of consent from proof of physical resistance, see *ibid*, para 180.

[25] *A, B, C v Ireland*, 16 December 2010, App. No. 25579/05, paras 235-41; *Christine Goodwin v. UK,* 11 July 2002, App. No. 28957/95, paras 85-90.

[26] Dzehtsiarou, *European Consensus*, 36-37. Quite how many states is necessary to establish consensus is unclear. However, it is clear that the approach need not be unanimous. For further discussion, see Section III(i) of this chapter.

sometimes negative, sometimes descriptive, sometimes prescriptive...'[27] Given this seeming lack of a coherent approach, how should we better understand the Court's use of consensus?

II. Standards of Conduct & The Use of Domestic Law

Whilst commentators on consensus have bemoaned the lack of consistency of the Court, none have methodologically examined how the Court uses consensus in its reasoning. In the ten-year period from 1 January 2005 to 1 January 2015, the Grand Chamber of the ECtHR delivered 183 judgments, of which it used comparative law in 60 judgments (33% of judgments).[28] In 73.3% of these (44 judgments), the Court used comparative law to interpret 'standards of conduct', such as necessity, fairness, or due diligence. In only 10% of judgments did the court use comparative law outside of these confines to interpret a more 'substantive' term, such what constitutes 'private life' under Article 8.[29] Later in this chapter, it is contended that these standards are inherently linked to what is accepted in society; they cannot *but* be interpreted in reference to the actual conduct of actors in that society, which is embodied in the domestic law of states.

This section outlines the four types of standards of conduct for which the Court has frequently made reference to domestic law: cases in which a standard of acceptable conduct is explicitly provided for (e.g. Article 6); cases in which legitimate limitations to a right are explicitly permitted (Articles 8-11); cases in which implied limitations to a right have been accepted by the Court (e.g. Articles 2-3 of Protocol No. 1); and cases in which consensus has been used to specify the remit of a purportedly absolute right (in particular, Articles 2 and 3). In ten of the 60 cases examined, the Grand Chamber outlined the approaches taken in domestic jurisdictions but

[27] P. Martens, 'Perplexity of the National Judge faced with vagaries of European Consensus', in European Court of Human Rights, *Dialogue between judges* (Council of Europe 2008) 54.
[28] The sample of judgments examined in this thesis is limited to the Grand Chamber of the ECtHR as it would be infeasible to survey all judgments of the Court in the same period, which total 11872 judgments.
[29] *Söderman v Sweden*, 12 November 2013, App. No. 5786/08, para 105.

did not rely on this data in its operative reasoning,[30] whereas in only six cases did the Grand Chamber rely on comparative law to justify evolutive interpretation outside of the 'standards of conduct' outlined below.[31]

i. Explicit Standards

With regard to the first of these four categories, the case of *Taxquet v Belgium* illustrates the use of comparative law to interpret what constitutes a 'fair' hearing under Article 6(1).[32] In that case, the applicant argued that the absence of reasons accompanying a Belgian lay jury's guilty verdict infringed his Article 6 right. The Court rejected this claim by referring to previous cases in which it had addressed the issue, but went on to state that, in the absence of a reasoned verdict:

> Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction. Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced [referring to a survey of 38 Council of Europe states]...[33]

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[30] *Anheuser-Busch Inc. v Portugal*, 11 January 2007, App. No. 73049/01, paras 39-40; *D.H. and others v Czech Republic*, 13 November 2007, App. No. 57325/00, paras 105-107; *Burden v U.K.*, 29 April 2008, App. No. 13378/05, paras 25-28; *A. v U.K.,* 19 February 2009, App. No. 3455/05, paras 111-13; *Sergey Zolotukhin v Russia*, 10 February 2009, App. No. 14939/03, para 79; *Perdigao v Portugal*, 16 November 2010, App. No. 24768/06, paras 47-50; *Serife Yiğit v Turkey*, 2 November 2011, App. No. 3976/05, paras 41-44; *El-Masri v the former Yugoslav Republic of Macedonia*, 13 December 2012, App. No. 39630/09, paras 106-07; *Nada v Switzerland*, 12 September 2012, App. No. 10593/08, paras 94-101; *Allen v U.K.*, 12 July 2013, App. No. 25424/09, paras 73-77.

[31] *Stec and others v U.K.*, 12 April 2006, App. No. 65731/01 & 65900/01, paras 64-65; *Evans v U.K.*, 10 April 2007, App. No. 6339/05, para 79; *Micallef v Malta,* 15 October 2009, App. No. 17056/06, paras 78-81; *Lautsi and others v Italy*, 18 March 2011, App. No. 30814/06, para 70; *Söderman v Sweden*, 12 November 2013, App. No. 5786/08, para 105; *Hämäläinen v Finland*, 16 July 2014, App. No. 37359/09, paras 73-75.

[32] *Taxquet v Belgium,* 6 November 2010, App. No. 926/05. See also *Kyprianou v Cyprus*, 15 December 2005, App. No. 73797/01, para 124; *Gäfgen v Germany*, 1 June 2010, App. No. 22978/05, para 174; *Nejdet Şahin and Perihan Şahin v Turkey*, 20 October 2011, App. No. 13279/05, para 82; *Al-Khawaja and Tahery v U.K.,* 15 December 2011, App. No. 26766/05 & 22228/06, para 139. Cf. fn 36 in Chapter Four regarding the use of domestic law to elaborate a similar provision by the ICTY.

[33] *Taxquet*, para 92, referring to the comparative survey carried out in paras 43-60. The comparative survey examined Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Cyprus, Latvia, Lithuania, Luxembourg, Moldova,

On the facts, the questions presented to the jury by the presiding judge were not of sufficient detail to allow the applicant to comprehend the evidence that had led to his conviction.[34] Comparative law was hence used as an aid to substantiate what 'fairness' within the context of Article 6 demanded from the contracting parties' judicial systems.

ii. Proportionality in Express Limitations

Examples abound of the use of comparative law by the Court to determine if state actions are justified infringements on Convention rights under the second paragraphs of Articles 8-11, which constitute 32% of cases in which the Grand Chamber has invoked comparative law. For each of these, the Court carries out a three-fold analysis: first, it determines if the interference is prescribed by law; second, the Court decides if the aim of interference is legitimate within the meaning of the particular article; and, third, it establishes whether the interference is 'necessary in a democratic society'.[35] It is within this final leg that the Court undertakes a test of proportionality, assessing if the interference is a proportionate response to the pressing social need faced by the state. Comparative law has been predominantly used within this leg of the test; in other words, in order to substantiate what is 'necessary in a democratic society'.[36]

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the Netherlands, Romania, San Marino, Turkey, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Monaco, Montenegro, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia, Sweden, "the former Yugoslav Republic of Macedonia", Ukraine, Austria, Belgium, Georgia, Ireland, Malta, Russia, Spain, Switzerland, and the U.K..

[34] *Taxquet*, paras 93-100.

[35] See for example, *Dudgeon,* para 43.

[36] See also *Leyla Sahin v Turkey*, 10 November 2005, App. No. 44774/98, para 109; *Sørensen and Rasmussen v Denmark,* 11 January 2006, App. No. 52562/99 & 52560/99, para 70; *Üner v the Netherlands*, 18 October 2006, App. No. 59450/00, paras 39-55; *Dickson v U.K.*, 4 December 2007, App. No. 44362/04, para 81; *Stoll v Switzerland,* 10 December 2007, App. No. 69698/01, paras 107, 155; *S. and Marper v U.K.,* 4 December 2008, App. No. 30562/04 & 30566/04, paras 107-12; *Brosset-Triboulet and others v France*, 29 March 2010, App. No. 34078/02, para 93; *A, B, C v Ireland*, 16 December 2010, App. No. 25579/05, paras 235-36; *Neulinger and Shuruk v Switzerland*, 6 July 2010, App. No. 41615/07, para 135; *Bayatyan v Armenia*, 7 July 2011, App. No. 23459/03, paras 122-23; *Palomo Sánchez and others v Spain*, 12 September 2011, App. No. 28955/06 & 28957/06 & 28959/06 & 28964/06, para 75; *S.H. and others v Austria*, 3 November 2011, App. No. 57813/00, paras 95-96; *Herrmann v Germany,* 26 June 2012, App. No. 9300/07, paras 79-80; *Van der Heijden v the Netherlands*, 3 April 2012, App. No. 42857/05, para 61; *Animal Defenders International v U.K.,* 22 April 2013, App. No. 48876/08, para 123; *Sindicatul 'Pastorul cel Bun' v Romania*, 9 July 2013, App. No.

An illustrative example is the case of *Demir and Baykara v Turkey*.[37] In that case, the applicants were civil servants that were prohibited from joining trade unions under the laws of Turkey. The Court recognised that this constituted an inference with the applicants' right to freedom of association under Article 11 and moved to address whether such a prohibition could be considered as a legitimate interference under Article 11(2).[38] In order to rebut the claim that placing restrictions on civil servants' ability to join trade unions answered a 'pressing social need', the Court adduced several arguments: first, Turkey had not specified what the 'pressing social need' was that justified this restriction; second, international, regional and comparative materials (including the domestic laws of *all* Council of Europe states) overwhelmingly recognised the right of civil servants to form and join trade unions; third, Turkey had signed Convention No. 87 of the International Labour Organization, which recognised this right; and finally, Turkey confirmed its willingness to recognise this right by actions of both the legislature and the judiciary.[39]

Although not the sole determinant of the necessity of a measure, the use of comparative law in this case assisted the Court in determining what constituted the socially acceptable standard of conduct at the relevant time: in this case, what was considered to be 'necessary in a democratic society'.

2330/09, para 171; *Fernández Martínez v Spain*, 12 June 2014, App. No. 56030/07, para 143; *S.A.S. v France*, 1 July 2014, App. No. 43835/11, para 156.

[37] *Demir and Baykara v Turkey*, 12 November 2008, App. No. 34503/97. See also R. Nordeide, 'Demir & Baykara v Turkey', (2009) 103 AJIL 567.

[38] *Demir and Baykara*, para 116.

[39] *Demir and Baykara,* paras 120-24.

iii. Proportionality in Implied Limitations

Analogous lines of reasoning can be found where implied limitations upon certain rights have been recognised by the Court, notably under Article 14 of the Convention, and Articles 2 and 3 of Protocol 1. Under these provisions, states may discriminate, or interfere with a Convention right, if that discrimination or interference pursues a legitimate aim and is proportionate, regardless of the absence of a specific clause allowing such infringement. The interpretation of implied limitations constitutes 27% of the cases in which the Grand Chamber has adduced comparative law.

Consider, for example, the case of *Tănase v Moldova.*[40] The applicant in that case claimed that the Moldovan law prohibiting those holding dual nationality from becoming members of Parliament breached his right to stand for election under Article 3 of Protocol 1.[41] The Court noted that such a restriction was anomalous in Council of Europe states, but that 'notwithstanding this consensus, a different approach may be justified where special historical or political considerations exist which render a more restrictive practice necessary.'[42] The Court recognised that Moldova, as a newly independent state, might legitimately want to place restrictions on those involved in its nascent democratic institutions for reasons of 'loyalty' to the state. However the fact that it had only put in place these restrictions 17 years after independence rendered such

[40] *Tănase v Moldova,* 27 April 2010, App. No. 7/08. See also *Hirst (No. 2) v U.K.*, 6 October 2005, App. No. 74025/01, para 81; *Yumak and Sidak v Turkey*, 8 July 2008, App. No. 10226/03, paras 129-32; *Georgian Labour Party v Georgia,* 8 July 2008, App. No. 9103/04, paras 103-04; *Kozacioglu v Turkey,* 19 February 2009, App. No. 2334/03, para 71; *Paksas v Lithuania*, 6 January 2011, App. No. 34932/04, para 106; *Depalle v France*, 29 March 2010, App. No. 34044/02, para 89; *Stummer v Austria*, 7 July 2011, App. No. 37452/02, para 109; *Kart v Turkey*, 3 December 2009, App. No. 8917/05, paras 97-98; *Konstantin Markin v Russia*, 22 March 2012, App. No. 30078/06, paras 140, 147; *Scoppola v Italy (No 3)*, 22 May 2012, App. No. 126/05, paras 95, 101; *Sitaropoulos and Giakoumopoulos v Greece*, 15 March 2012, App. No. 42202/07, para 74; *Stanev v Bulgaria*, 17 January 2012, App. No. 36760/06, para 243; *Fabris v France,* 7 February 2013, App. No. 16574/08, para 58; *Vallianatos and others v Greece*, 7 November 2013, App. No. 29381/09 & 32684/09, para 91; *X and others v Austria*, 19 February 2013, App. No. 19010/07, para 149.

[41] Although Article 3, Protocol 1 does not explicitly mention a 'right to stand for election', the Court has interpreted the provision as encompassing both an 'active' element (right to vote) as well as the 'passive' right to stand for election; *Ždanoka v Latvia*, 16 March 2006, App. No. 58278/00.

[42] *Tănase,* para 172.

arguments 'less persuasive'.[43] The Court continued to highlight the universal condemnation of the law by intergovernmental bodies and the unduly burdensome effect that the measure had on opposition parties to conclude that the prohibition was disproportionate.

Consensus in this case set a standard of acceptable interference with the right, albeit one from which derogations were permitted. This idea of consensus as a *prima facie* standard was clearly expounded by the Court in its exposition of the view that '[w]here there is a common standard which the respondent State has failed to meet, this may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases."[44]

iv. Defining Absolute Rights

In the abovementioned cases, consensus played a role in determining the proportionality of an interference with an enumerated right. However, in a small number of cases (5% of the total number of cases in which comparative law was used), it was a factor in shaping the right itself. Articles 2 and 3 enshrine the right to life and the prohibition of torture or inhuman and degrading treatment respectively. Whilst these are recognised as 'absolute rights' from which no derogations are permitted, the Court in practice undertakes an evaluation of factors (including comparative law) when interpreting the positive obligations incumbent on a contracting state under Article 2 or what constitutes 'inhuman or degrading treatment' for the purposes of Article 3.[45] Reference to several cases will illustrate this point.[46]

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[43] *Tănase,* para 173.

[44] *Tănase,* para 176.

[45] Natasa Mavronicola distinguishes between two criteria that help explain the Court's reasoning regarding absolute rights. The first - 'applicability' - provides that, where the right is found to apply, no derogation or exception is permitted. The second - 'specification' - sets the boundaries for the application of absolute rights. Only 'legitimate specifications' may be taken into account; that is, the Court must draw on 'ordinary concepts' that manifest principles underpinning the Convention and that do not collapse into consequentialism. N. Mavronicola, 'What is an Absolute Right? Deciphering the Absoluteness in the Context of Article 3 of the European Convention on Human Rights', (2012) 12 [4] Human Rights Law Review 723.

In *Opuz v Turkey*, the applicant claimed that the Turkish authorities had not fulfilled their positive obligations under Article 2 by failing to safeguard her mother from a foreseeable threat to her life.[47] The murderer, the applicant's husband, had a history of perpetrating domestic violence against his wife and mother-in-law, rendering further attacks 'not only possible, but foreseeable.'[48] The Turkish law in force at the time provided that a complaint lodged by the victim was necessary for prosecution of acts of violence, unless the result of the attack was to render the victim incapable of working for more than ten days, in which case public prosecution (i.e. without the complaint of the victim) could be pursued.[49]

The Court recognised that there was an obligation to show due diligence on the part of the state to protect to the lives of its citizens under Article 2. In substantiating what constituted 'due diligence', the Court made reference to the domestic laws of thirty nine contracting parties regarding public prosecution of violent domestic crimes.[50] It detailed the factors commonly taken into account by contracting parties to the Convention when deciding whether to pursue public prosecution, such as the seriousness of the offence; whether the victim's injuries are physical or psychological; if the defendant used a weapon; if the defendant has made any threats since the attack; if the defendant planned the attack; the effect (including psychological) on any children living in the household; the chances of the defendant offending again; the continuing

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[46] See also *Vinter and Others v U.K.,* 9 July 2013, App. Nos. 66069/09, 130/10 and 3896/10, para 117; *Nachova and others v Bulgaria*, 6 July 2005, App. No. 43577/98 & 43579/98, para 100; *Jalloh v Germany*, 11 July 2006, App. No. 46410/99, paras 77-78. For an earlier example of the use of comparative law to define an absolute right, see *T. v U.K.,* 16 December 1999, App. No. 24724/94, paras 70-72.

[47] *Opuz v Turkey*, 9 June 2009, App. No. 33401/02.

[48] *Opuz,* para 142.

[49] *Opuz,* para 70.

[50] *Opuz,* paras 87-88, 138. The comparative study surveyed Albania, Austria, Bosnia and Herzegovina, Estonia, Greece, Italy, Poland, Portugal, San Marino, Spain, Switzerland, Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, England and Wales, Finland, "the former Yugoslav Republic of Macedonia", France, Georgia, Germany, Hungary, Ireland, Latvia, Luxembourg, Malta, Moldova, the Netherlands, the Russian Federation, Serbia, Slovakia, Sweden, Turkey, Ukraine, and Romania.

threat to the health and safety of the victim or anyone else who was, or could become, involved; the current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes; the history of the relationship, particularly if there had been any other violence in the past; and the defendant's criminal history, particularly any previous violence.

Although the Court recognised that no general consensus existed regarding when to pursue public prosecution, it nevertheless considered that 'It can be inferred from [the practice of the states surveyed] that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.'[51] On this basis, the Court concluded that the local authorities did not sufficiently consider these factors when repeatedly deciding to discontinue the criminal proceedings against the applicant's husband.

Similarly, the Court had recourse to comparative law in order to substantiate when a penal sentence would amount to inhuman and degrading treatment under Article 3 of the Convention. In *Harkins and Edwards v U.K.,*[52] an extradition request had been submitted by the United States to the U.K. for transfer of the applicants to face charges of murder for separate offences. The applicants argued that, if extradited, they faced risk of being sentenced to death or to a life sentence without parole, which – they contended – breached the U.K.'s positive obligation to protect the Article 2 and 3 rights of those within its jurisdiction. After accepting assurances from U.S. state prosecutors that they would not seek the death penalty, the Court moved to consider whether a penal sentence could constitute inhuman or degrading treatment, and – if so – the

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[51] *Opuz*, para 138-39.

[52] *Harkins and Edwards v U.K.,* 12 January 2012, App. nos. 9146/07 and 32650/07. This was followed in *Babar Ahmed and Others v U.K.,* 10 April 2012, App. nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09. It should be noted that this is *not* a judgment of the Grand Chamber.

attributes that would give it this character. The Court stated that the comparative materials it was presented 'demonstrate that "gross disproportionality" is a widely accepted and applied test for determining when a sentence will amount to inhuman or degrading punishment, or equivalent constitutional norms.'[53] The Court continued:

> *Consequently*, the Court is prepared to accept that while, in principle, matters of appropriate sentencing largely fall outside the scope of Convention, a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition. However, the Court also considers that the comparative materials set out above demonstrate that "gross disproportionality" is a strict test and, as the Supreme Court of Canada observed in *Latimer*, it will only be on "rare and unique occasions" that the test will be met.[54]

In the face of criticisms of incoherence, the use of comparative law in interpretation shows surprising consistency. It is consistently invoked to interpret 'generic' standards of conduct that can only be understood with their societal context, providing a rebuttable presumption that states' actions manifest what the Council of Europe members consider to be necessary, fair, or due diligence. It is this understanding of the consensus doctrine that forms the basis of the legitimacy analysis conducted at the end of this chapter. However, before that we must address the barrage of criticism that has been levelled at the Court's use of consensus.

III. No Consensus on Consensus

Critiques of the use of consensus have been generally advanced on two fronts: those that take issue with the methodology of the Court when using consensus, and those that have substantive

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[53] *Harkins and Edwards*, para 133. The Court made reference to the laws of Austria, Belgium, Czech Republic, Estonia, Germany, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Switzerland, Turkey, the U.K., Canada, the US, South Africa, Belize, Mauritius, Namibia, Hong Kong, and New Zealand; *Harkins and Edwards*, paras 59-61, 66-81.

[54] *Harkins and Edwards*, para 133 (emphasis added).

qualms with its invocation. This section demonstrates that none of the methodological or substantive critiques convincingly rebuts the utility of comparative law as a matter of principle. The third part of this section turns to address the arguments made in support of the consensus doctrine, highlighting the vague references to an undefined notion legitimacy that are often invoked. Although intuitively attractive, these arguments fall short by failing to define the conception of consensus to which they refer.

i. Methodological Critiques

The main methodological critique advanced by commentators is that the use of comparative law by the ECtHR lacks methodological rigour: it is unclear how many states must be surveyed, how many states constitute the consensus approach, and whether contextual factors are taken into account.[55] Underpinning this criticism is the idea that consensus is mere subterfuge for the judges' own values, enabling their subjective preferences to be cloaked in a veil of formal law. In the words of one author, 'vague references to emerging national standards, which are not empirically verifiable, undermine [the Court's] credibility and sow the seeds of suspicion that they are engaged in an unfounded judicial activism.'[56]

To a certain extent, the sting of this critique may be alleviated with the increased detail of comparative surveys provided in recent judgments of the Court. Although the pre-Protocol 11,[57] part-time ECtHR lacked the personnel and resources to carry out thorough comparative

[55] See, Carozza, 'Uses and Misuses of Comparative Law', 1233; Dzehtsiarou, *European Consensus*, 78-82; Helfer, 'Consensus, Coherence and the European Convention on Human Rights', 133-41.
[56] Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 192-93.
[57] Protocol 11 established the current, full-time ECtHR, abolishing the former two-tier adjudicatory system of the Commission and the Court.

research,[58] transparency has increased with the advent of the full-time Court and the newly created Research Division.[59] As a result, the use of comparative law by the Court has generally – although not uniformly – become 'visibly more professional and detailed.'[60] For example, the Chambers and Grand Chamber of the 'new' Court readily detail the comparative law analyses undertaken in 75.4% of judgments.[61] This has allowed commentators to induce from the case law that, although the 'actual criterion [for consensus] remains a mystery',[62] the Court 'frequently, but not consistently, opts against the existence of consensus, as long as some 6 to 10 States adhere to solutions which differ from the majority view.'[63] With the increasing transparency of the Court's reasoning, the ability for consensus to obscure the 'principled' reasoning of the bench diminishes. By detailing the comparative methodology, the Court is forced situate itself and its judgment in relation to that survey, expressly adhering to the consensus view or disavowing it.[64]

As was the case with the ICTY, a full, comprehensive, contextualised comparative survey would demonstrate to the addressees of the judgment, and to the wider community, that the Court's use of comparative law is not simply a matter of looking out over a crowd and picking out your

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[58] Wildhaber *et al.,* 'No Consensus on Consensus?', 257. Previously, comparative research fell to the judges themselves: 'Luzius Wildhaber [former Judge and President of the ECtHR] remembers that in the early 1990ies, the Registry wrote letters to the Judges and asked them to help explore issues of domestic law relevant for consensus analysis'; *ibid.*

[59] K. Dzehtsiarou, 'Consensus from within the Palace Walls', UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 40/2010, 5-6. Dzehtsiarou, *European Consensus*, 88.

[60] Wildhaber *et al.,* 'No Consensus on Consensus', 257.

[61] Wildhaber *et al,* 'No Consensus on Consensus?', 258. See for example *Bayatyan*, paras 46-49. See also P. Mahoney & R. Kondak, 'Common Ground: A Starting Point or Destination for Comparative-law Analysis by the European Court of Human Rights', in M. Andenas & D. Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015).

[62] H. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Intersentia 2011) 395.

[63] Wildhaber *et al.,* 'No Consensus on Consensus', 259. The authors also conclude that in 56% of post-1998 judgments that discuss consensus, 60-67% or more of member states are surveyed; in 12.3% of cases, around half of the 47 member states are examined; and in 7% of cases, less than a quarter of the member states. In 24.6% of cases, the new Court adopts the approach of the old Court, and does not explicitly say which countries it has taken into account; *ibid*, 258.

[64] Compare *M.C.*, para 166 with *A, B, C,* paras 235-41.

friends.[65] However, time and budget restraints might well preclude such work.[66] Moreover, if such studies were carried out, it seems highly unlikely that such a voluminous work could or should be included in its entirety in the final judgment.

The methodological critique does not claim that the use of domestic law is as a matter of principle unjustifiable. Indeed, quite on the contrary, the advancement of a methodological critique presupposes that there is utility to the use of domestic law if correctly deployed.[67] Substantive critiques, on the other hand, claim that the pernicious use of domestic law undermines the very basis of human rights protection, and it is to those claims that we now turn our attention.

ii. Substantive Critiques

Of the substantive critiques of consensus, perhaps the most damning are those that criticise the Court for abdicating it's duty to protect minorities from the tyranny of the majority and to uphold universal moral truths by interpreting rights in reference to relative standards.

The most vociferous and detailed substantive critique of consensus has been provided by George Letsas, who takes issue with the Court's use of consensus on two grounds. First, he invokes a strand of case law in which the Court uses the lack of consensus of 'public morals' to defer to the judgement of the respondent state regarding legitimate incursions on, for example, free speech.[68] The use of consensus to defer to the state is, he argues, a manifestation of the tyranny of the majority – precisely that which human rights should protect against. In other

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[65] A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton UP) 36.
[66] Dzehtsiarou, *European Consensus,* 88 (noting that the Research Division still has a 'heavy workload').
[67] Most clearly, this is the position of Kanstantin Dzehtsiarou; Dzehtsiarou, *European Consensus*, 72-114, 209.
[68] *Handyside v U.K.,* 7 December 1976, App. No. 5493/72, para 48; *Müller and Others v Switzerland*, 24 May 1988, App. No. 10737/84, para 35; *Wingrove v U.K.,* 25 November 1996, App. No. 17419/90, para 58; *Murphy v Ireland*, 10 July 2003, App. No. 44179/98, para 67.

words, by using the consensus of domestic laws as a reason not to question the legality of a law, the Court is not fulfilling its duty to protect minorities that could be persecuted by the majoritarian legislature in their state.[69] 'Needless to say', he asserts, 'no plausible theory of human rights, at least one with liberal-egalitarian aspirations, would ever allow moralistic preferences to constitute a legitimate restriction on liberty.'[70]

Letsas' argument that the use of consensus entails giving effect to the 'moralistic preferences' of the majority to oppress minorities has merit, but the dangers are overemphasised. Undoubtedly, this could be the case and in such instances the use of consensus is to be deplored. However, Letsas' account is incorrect for two reasons. First, his argument works on the basis that the challenged law is consonant with the consensus approach in the other Council of Europe states, and hence the oppressed minority in the respondent state is provided with no relief by the Court due to the consensus in other Council of Europe states. In other words, it is the tyranny of the democratic majority confirmed by the tyranny of the majority by consensus. But this need not be the case – the Court could use consensus as a tool to deem the domestic law illegal, protecting the oppressed minority in the contracting state.[71]

Take the case of *Bayatyan v Armenia* for example.[72] In that case, the applicant was a Jehovah's Witness that conscientiously objected to the compulsory military service in Armenia. He brought a case to the ECtHR claiming that the compulsory conscription breached his Article 9 right to

[69] Letsas, *A Theory of Interpretation*, 121-23.
[70] Letsas, *A Theory of Interpretation*, 121.
[71] Note that this is the case even if we focus upon Letsas' example of the interpretation of 'public morals' under Article 10(2). That consensus could be used in the face of nationalist intransigence was recognised at the start of the twentieth century by François Geny, who loquaciously stated that 'derrières les phénomènes psychologiques d'imitation, qui représente l'action extérieure réciproque des droits de divers pays, se révèle sans peine l'idée, qu'une règle, dégagée du consensus des systèmes juridiques, places à un même niveau de civilisation, a, pour elle, une sorte de conscience juridique collective, plus large que celle qui ne se manifeste qu'au sein d'un pays déterminé, et capable, par suite, de vaincre, au besoin, certaines résistances nationales.' ; F. Gény, *Méthode d'interprétation et sources en droit privé positif* vol. II (2nd edn, L.G.D.J. 1919) 274.
[72] *Bayatyan v Armenia*, 7 July 2011, App. No. 23459/03.

freedom of thought, conscience and belief. The Court recognised that the 'overwhelming majority' of Council of Europe states had recognised a right to conscientious objection, with only Armenia, Azerbaijan and Turkey not recognising such a right.[73] In light of these considerations, as well as international instruments recognising such a right, the Court decided that by not providing the applicant with any non-military alternative service, the inference with his Article 9 right was not 'necessary in a democratic society'. In a particularly pertinent passage, the Court stated that

> Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.[74]

In this case, therefore, Letsas' contention that consensus analysis panders to the majority view to the detriment of the minority is contradicted. It seems to be incontrovertible that, in some instances at least, consensus analysis is used to protect minority rights in a state. Similarly, the domestic law challenged might protect minorities but be unpopular with, and challenged by, other groups in society. In such a scenario, the Court could use consensus to defeat the challenge

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[73] *Bayatyan*, paras 48, 103-09, 124-29. The comparative study surveyed United Kingdom, Denmark, Sweden, the Netherlands, Norway, Finland, Germany, France, Luxembourg, Belgium, Italy, Austria, Portugal, Spain, Poland, the Czech Republic, Hungary, Croatia, Estonia, Moldova and Slovenia, Cyprus, the former Federal Republic of Yugoslavia (which in 2006 divided into two member States: Serbia and Montenegro, both of which retained that right) and Ukraine, Latvia, Slovakia and Switzerland, Bosnia and Herzegovina, Lithuania, Romania, Georgia, Greece, Bulgaria, "the former Yugoslav Republic of Macedonia", Russia, Albania, Azerbaijan, and Turkey.
[74] *Bayatyan*, para 126 (emphasis added, citations omitted).

to the law protecting the minority. Letsas' argument that the use of consensus necessarily engrains the tyranny of the majority is premised on a view of consensus that cannot be sustained.

Second, Letsas neglects to take into account that consensus has been used to promote the progressive evolution of domestic legislation to provide *better protection* for the rights of minorities. An illustrative example is the *Goodwin* case. In that case, the Court decided that the U.K. could no longer maintain that full legal recognition of transsexuals was within its margin of appreciation in the face of 'an increase in the [global] social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted',[75] which was confirmed by a comparative survey.[76] As a result of the judgment, the U.K. Parliament passed the Gender Recognition Act 2004, which allowed transsexuals to gain full legal recognition upon assessment by a Gender Recognition Panel. In the commentary to the Act, which specifically cites the ECtHR judgment in *Goodwin,* the government recognised that it 'ha[d] a positive obligation under international law to secure the Convention rights and freedoms and must rectify these ongoing breaches [those identified in *Goodwin*].'[77] Although it is impossible to attribute decisive influence to the Court's use of consensus, Letsas himself recognises that the *Goodwin* judgment gives effect to the principles of legality and equality, yet he ignores the purported reasons for which it did so.[78]

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[75] *Christine Goodwin v. U.K.,* 11 July 2002, App. No. 28957/95, para 92.

[76] The judgment cited the change of position in Singapore, Canada, South Africa, Israel, Australia and New Zealand, as well as all but two of the states of the United States; *Goodwin*, para 56.

[77] *Gender Recognition Act 2004: Explanatory Notes* (HMSO 2004), para 6, available at <www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpgaen_20040007_en.pdf>.

[78] Letsas, *A Theory of Interpretation*, 124.

The second strand of Letsas' critique is based on the case law regarding the legal recognition of transsexuals, culminating in *Goodwin*.[79] He claims that

> [T]he idea [of the use of consensus in the line of cases] seems to be that the Court should wait for a consensus within Contracting States to be established, before it rules something to be a violation. This is because it is felt that the Court should not rush into finding the majority of states in breach of the Convention whenever there is a new evolving standard. Rather, it should first warn them that a new standard is evolving and allow them time to reform their policies gradually, in line with present-day conditions.[80]

This 'piecemeal evolution', he claims, cannot be justified either by the notion that consensus provides state consent as to the evolutive interpretation, nor can it be justified by the realist argument that consensus analysis increases the likelihood of compliance and hence safeguards the authority of the Court.[81] In fact, the denial of legal recognition of transgender people prior to the *Goodwin* case 'treated the applicants in an unprincipled manner ... [which] deeply offends the values of legality and equality.'[82]

This critique is based on a certain view of rights and a certain view of the appropriate interpretive practice of the ECtHR, which need to be outlined in order to fully understand Letsas' critique. Letsas believes that the rights enshrined in the European Convention are transcendental and universal: that they are extant 'abstract moral truths' which bind states regardless of any convention obligation, and the retrieval and protection of which is the aim of

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[79] *Rees v U.K.,* 17 October 1986, App. No. 9532/81, para 37; *Cossey v U.K.,* 27 September 1990, App. No. 10843/84, para 37; *Sheffield and Horsham v U.K.*, 30 July 1998, App. No. 31-32/1997/815-816/1018-1019, para 52; *Christine Goodwin v U.K.,* 11 July 2002, App. No. 28957/95, para 72; *I v U.K.,* 11 July 2002, App. No. 25680/94, para 52.
[80] Letsas, *A Theory of Interpretation*, 123.
[81] F. de Londras & K. Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights', (2015) 15 Human Rights Law Review 541-44.
[82] Letsas, *A Theory of Interpretation*, 124.

the Court.[83] This belief in the transcendental nature of certain rights accords well, he claims, with the interpretive practice of the European Court. For him, it explains why the Court eschews a textualist or intentionalist approach, instead focussing on an examination of 'the substance of the human right at issue and the moral value it serves in a democratic community'.[84] In Letsas' view, therefore, there already exist goals – 'abstract moral truths' – against which the adequacy of the jurisprudence of the Court can be assessed, and in reference to which its case law most makes sense.[85] Set against this theory of interpretation, consensus has no place – it is superfluous: 'the Court applie[s] a first-order moral reading of the ECHR rights, adding hesitant and redundant remarks about this being somehow commonly accepted."[86]

Leaving aside the rather contentious suggestion that rights are objective morals truths that can be retrieved from the ether,[87] Letsas' critique of consensus as a vehicle for evolutive interpretation falls short on two counts. First, it assumes that his theory of interpretation – that the Court has interpreted the Convention as if on some intractable march towards realisation of perfect rights – is valid, and that consensus analysis is just an anomaly. But this just does not square with the consistent and continuous use of consensus by the Court over the past 35 years. Letsas seems to ignore the fact that the invocation of comparative law is not just a singular aberration on an otherwise smooth road to the discovery of objective moral truth. Instead, it seems to be something more fundamental to the interpretive practice of the Court, something that cannot be explained away as an error or a superfluity. Second, Letsas recognises that consensus does

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[83] Letsas, 'Strasbourg's Interpretive Ethic', 540.

[84] Letsas, 'Strasbourg's Interpretive Ethic', 520. Extrapolating from the heavy influence that Dworkin seems to have exerted on Letsas, it seems to be that this view of the interpretive practice of the ECtHR is his attempt to frame the case law of the Court in its 'best light'.

[85] Letsas, 'Strasbourg's Interpretive Ethic', 528; 'The Court is more interested in the moral value the Convention rights serve and what arguments best support it rather than on whether such agreements are widely shared across the Council of Europe.'

[86] Letsas, 'Strasbourg's Interpretive Ethic', 531.

[87] See for example, L. Henkin, 'The Universality of the Concept of Human Rights', (1989) 506 Annals of the American Academy of Political and Social Science 10, 12.

sometimes actually coincide with an evolution towards moral truth. To illustrate this, he gives the example of the *Dudgeon* case, stating that

> [T]here is an apparent effort in the [judgment] to base its reasoning on what is now believed in the great majority of the member states, it is equally striking that the Court takes contemporary understanding to be *better* and not merely different from that at the time when anti-homosexual legislation was enacted ... the change to affect the interpretation of an ECHR right must constitute an improvement, moving closer to the truth of the substantive protected right.[88]

If consensus pushes the Court towards this 'better' interpretation of the Convention, is it still to be disregarded or deemed superfluous? At the very least, then, Letsas must admit that consensus is useful if it facilitates a movement towards the protection of abstract moral rights. However, this possibility is not admitted in his critique of the 'piecemeal evolution' of the Convention culminating in the *Goodwin* case. If the Court 'is to discover, over time and through persuasive moral argument, the moral truth about these fundamental rights', there seems no reason why consensus analysis cannot contribute to the strength of the moral arguments proffered.[89]

Eyal Benvenisti is similarly critical of the use of the consensus by the Court, claiming that, from a theoretical perspective, it 'can draw its justification only from nineteenth century theories of State consent.'[90] Whilst Benvenisti rightly recognises that consent-based theories of international law are outmoded, he makes no convincing argument that consensus analysis is in fact the search for state consent, and there is no reason to think why this is so. Perhaps most obviously, the laws examined by the Court inevitably pertain to the domestic relationship between the state and its

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[88] Letsas, 'Strasbourg's Interpretive Ethic', 531.
[89] Letsas, 'Strasbourg's Interpretive Ethic', 540.
[90] E. Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', (1999) 31 NYU JILP 843, 852.

citizens, and not its *opinio juris* regarding international obligations.[91] Take, for example, the abovementioned case of *M.C. v Bulgaria*, in which domestic laws on rape were surveyed.[92] Those criminal statutes clearly did not directly pertain to international law nor did they provide implicit consent to any international legal standard regarding criminalisation of conduct. A more solid argument might be that the use of consensus is 'apologetic' to states, attributing undue importance to sovereignty. This criticism might have purchase, but does not rely on the concept of state consent nor does it make sense conceptualise the use of comparative law as a form of 'updated consent'.[93]

Whilst raising valid concerns, the substantive critiques of the use of comparative law in the ECtHR do not rule out its utility as a matter of principle, instead focussing on potential pitfalls that have not as yet eventuated in practice. The next section turns to examine the arguments made in favour of the use of consensus.

iii. Defences of Consensus

Those that defend the Court's use of consensus often base their arguments on the legitimacy afforded to the Court by the use of comparative law. However, many accounts fail to flesh out a fully formed conception of consensus, instead basing their argument on a nebulous notion that cannot be pinned down.

[91] The practice of states as it pertains to their international obligations is obviously important as subsequent practice under Article 31(3)(b) VCLT or as state practice for the purposes of custom.
[92] *M.C.*, paras 88-108, 130-47.
[93] Dzehtsiarou, *European Consensus,* 152.

For Kanstantin Dzehtsiarou, legitimacy comes from the increased acceptability to states of a judgment that adopts consensus analysis.[94] Consensus, Dzehtsiarou contends, 'is designed to ensure the consent of States, convince the general public, and secure obedience.'[95] The fact that a state is more likely to effectuate a judgment that invokes consensus is all that is necessary to justify the interpretive technique. Dzehtsiarou claims that invoking the consensus doctrine 'is persuasive because it is based on the decisions that are made by democratically elected bodies'.[96] This claim is questionable on three counts. First, if consensus were *only* persuasive because it refers to decisions of democratically elected bodies, then – as Letsas and Benvenisti point out – the Court would be led down the path of pandering to the will of the minority-oppressing majority in contracting states. Second, if consensus provides legitimacy to a judgment *tout court,* why does the Court not adopt consensus analysis in each and every judgment? Surely this cannot be the case, however Dzehtsiarou does not elaborate upon the instances in which consensus might augment the legitimacy of the judgment. Finally, Dzehtsiarou adduces no evidence to support the claim that consensus actually does make judgments more acceptable to states.

Paul Mahoney, a former Registrar and current Judge at the ECtHR, takes a more nuanced view of the legitimising power of consensus. He argues that the use of comparative law forestalls the claim that the ECtHR is involved in judicial legislation:

> [T]he anchoring of an evolved meaning to empirical evidence, namely the perceivable changes in the legislative patterns of the contracting States, is a counter to the argument that

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[94] K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the case law of the European Court of Human Rights', (2011) Public Law 534, 536. In his monograph-length treatment of the topic, Dzehtsiarou's conception of legitimacy is even more vague, variously basing legitimacy on state consent (Dzehtsiarou, *European Consensus,* 155), facilitation of dialogue between international and national legal systems (*ibid*, 158), consistency, coherence, predictability, and certainty (*ibid*, 159-60), and even adherence to the traditional sources doctrine in international law (*ibid*, 161).

[95] Dzehtsiarou, 'Does Consensus Matter?, 539.

[96] Dzehtsiarou, 'Does Consensus Matter?, 553. It seems as though Strasbourg judges, at least, consider that consensus potentially plays a legitimating role; 544-45.

> the Strasbourg judges are trespassing into the Treaty-amendment domain of the contracting States or are simply relying on their own personal sense of justice to make new law.[97]

Moreover, he claims that it is 'natural' for the Court to draw on the domestic laws of contracting states when one bears in mind the shared values that motivated the drafting and conclusion of the ECHR. '[S]ince the ECHR is a kind of fusion of national constitutional principles safeguarding human rights in Europe', Mahoney argues, 'having regard to the common character – or lack of it – of those legislations is surely legitimate when interpreting the ECHR.'[98] Consensus has a place as a non-binding interpretive aid in the repertoire of the Court, albeit that 'comparative law considerations constitute only one element in a complex law-making process.'[99]

Former Judge and President of the Court, Luzius Wildhaber, also generally adheres to the legitimacy justification of consensus, but refutes the idea that monocausal explanations can fully capture 'the richness, the variety and the recurrent inconsistencies of the Court's case-law'.[100] Instead, he and his co-authors emphasise that the use of consensus is two-pronged, encompassing both a 'rein' effect that provides a check on aberrant states, and a 'spur' effect that promotes change in reticent states. Taking a multifaceted view of consensus rebuts critiques that consensus either inevitably privileges the status quo or that it leads the Court to 'overreaching' its judicial function.[101]

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[97] Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights', 147.
[98] Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights', 147.
[99] R. Bernhardt, 'Comparative Law in the Interpretation and Application of the European Convention on Human Rights', in S. Busuttil (ed), *Mainly Human Rights: Studies in Honour of JJ Cremona* (Fondation Internationale Malte 1999) 36, quoted in Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights', 150.
[100] Wildhaber *et al.,* 'No Consensus on Consensus', 251.
[101] See for example Martens, 'Perplexity of the National Judge faced with vagaries of European Consensus', 95; T. Zwart, 'More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How it can be done' in S. Flogaitis *et al* (eds), *The European Court of Human Rights and its Discontents* (Edward Elgar 2013) 89-93.

Whilst the argument from legitimacy seems plausible, the arguments advanced are lacking from both a theoretical and empirical perspective. With regard to theory, none of the authors link the situations in which the Court does, or should, use consensus to an adequate explanation of how consensus might provide legitimacy. Nor do they proffer evidence upon which the import of consensus for the legitimacy of the Court could be shown. The following section of this chapter will embark upon an argument of the former type.

An altogether different justification for reference to domestic law has been suggested by the International Law Commission in the course of its work on subsequent agreements and subsequent practice in treaty interpretation. The first two reports of the Special Rapporteur on the topic, Georg Nolte, characterise the use of consensus by the ECtHR as recourse to the 'subsequent practice' of contracting parties that must be taken into account by the interpreter under Article 31(3)(b) of the Vienna Convention on the Law of Treaties.[102] Domestic law relevant to Article 31(3)(b) must be taken 'in the application of the treaty.'[103] However, it seems tenuous at best to suggest that the practice cited in the ECtHR reflects how parties understand their obligations under the ECHR: the Court quite simply makes no attempt to establish this nexus, nor is it clear that such a connection actually exists.[104] To qualify the domestic law cited as subsequent practice in respect of convention obligations hence seems misguided.

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[102] G. Nolte, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation' UN Doc A/CN.4/660 (19 March 2013) paras 37, 98; G. Nolte, 'Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation' UN Doc A/CN.4/671 (26 March 2014), para 14.

[103] Nolte, 'First Report', paras 93, 111. Nolte also notes that consensus could fall under Article 32 of the VCLT, which permits reference to the preparatory work of a treaty and to the circumstances of conclusion of a treaty. It is unclear which of these categories he considers that it could fall under; Nolte, 'First Report', para 107.

[104] The distinction drawn between subsequent practice that falls under Article 31(3)(b) and Article 32 is that the former must manifest an agreement between parties regarding the interpretation of the provision, whereas the latter need not show such agreement; Nolte, 'First Report', para 93.

In conclusion, the arguments advanced against consensus do not successfully reject the use of comparative law in every instance. Even if one grants that consensus may, in some circumstances, ingrain the tyranny of the majority or obstruct the Court's interpretive path to 'moral truths', one cannot maintain that this will inevitably obviate the potential utility of consensus. At the opposite end of the spectrum, the main issue with the authors that advocate the use of consensus is the lack of a theory of *when* and *why* the Court uses consensus, and *how* it provides legitimacy to its judgments, or evidence that it in fact does. The examination of the case law of the Grand Chamber in Section II demonstrates a general tendency that helps explain how and why consensus analysis might be desirable, and it is upon this that the following section will build.

IV. SUBSIDIARITY AND STANDARDS OF CONDUCT

Drawing on the work conducted in Section II, this section analyses the Court's use of comparative law within the legitimacy framework elaborated in Chapter 3. In a relatively small community of 47 states, standards of conduct cannot *but* be interpreted by reference to the accepted conduct within that community. To do otherwise would give the impression that the bench was giving effect to its own values and engaging in judicial activism, foisting its own conception of the appropriate means of protecting Convention rights on contracting states and thus breaching the principle of subsidiarity.[105]

[105] An excellent example of such a reaction is the U.K. Conservative Party's plan to repeal the Human Rights Act 1998 – and thus repeal the section 2(1)(a) obligation for courts to take into account ECtHR judgments – on the basis of the ECtHR's 'mission creep'; see Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws', archived at <http://web.archive.org/web/*/https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf>.

i. Interpretive Authority and Procedural Justice

The first two elements of legitimate interpretation – interpretive authority and procedural justice – may be dealt with briefly. With respect to interpretive authority, the cases brought before the Court involve two parties (normally, one contracting state and one or a group of natural or legal persons), both of which have consented to have their dispute adjudicated by the Court. States have recognised that the jurisdiction of the Court extends to the interpretation of the Convention and that judgments of the Court are binding by virtue of Articles 32(1) and 46(1) of the Convention, respectively. The applicant, on the other hand, is presumed to have consented to the authority of the Court by virtue of having made an application to the Court to have their grievance adjudicated upon. The consent of both parties to have the dispute – including any related interpretive matters – definitively settled by the Court endows it with the interpretive authority that is partly constitutive of legitimate interpretation.

In respect of procedural justice, the ECtHR fulfils the minimum requirements outlined in the list of Jeremy Waldron in Chapter 3: parties have a right to representation, to be present at hearings, to invoke and examine witnesses, the Court must give reasons.[106] No issues of systemic procedural impropriety that may impact on the legitimacy of the Court's judgments arise.

ii. The Values Underpinning the ECtHR

This brings us to the third element of legitimate interpretation; namely, shared values. As was the case in the previous chapter, a necessary prior step in this enquiry is to address what the values underpinning the ECtHR have been understood and accepted to be. The most pertinent value for our purposes is that of subsidiarity. This is obviously not the only value underpinning the

[106] See in particular, Title II of the ECtHR Rules of Court; ECHR Registry of the Court, Rules of Court (1 June 2015).

ECHR human rights regime, however, it is the value most directly relevant to the functioning of the judicial mechanism of the ECtHR.

The Court is understood to provide a subsidiary mechanism for the protection of Convention rights, with the legal systems of the contracting parties taking the primary role. The importance of subsidiarity, which has 'animated the region's human rights regime since its inception',[107] is aptly demonstrated by reference to Article 1 of Protocol 15 of the Convention, which will insert a paragraph in the Preamble of the Convention enshrining the principle.[108] Similarly, the subsidiary nature of the ECtHR was reiterated by the Committee of Ministers of the Council of Europe in the three declarations, in 2010, 2011, and 2012.[109] Most clearly, Recital 3 of the Brighton Declaration provides that

> The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, inter alia, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court.

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[107] L.R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', (2008) 19 EJIL 125, 159.

[108] Protocol 15 has not yet entered into force, but will do so when all contracting parties have ratified the instrument. Currently, 19 states have ratified the Protocol. Article 1 reads 'At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,".'

[109] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration (2010), Recital 2, section B; High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration (2011), Recital 5; High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (2012), Recital 3.

Understood thus, the concept of subsidiary simply provides that the Court will not foist its conception of the appropriate method of protection of Convention rights on contracting parties.[110]

Not only has the value of subsidiary constantly been reiterated by contracting parties, but it is has also been acknowledged to be of fundamental importance by members of the Court, both in judicial and extra-judicial writings.[111] In *Handyside*, for example, the Court recognised that it was 'for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' [in Article 10(2)] ... Nevertheless, Article 10(2) does not give the contracting states an unlimited power of appreciation'.[112] The acknowledgement of the principle of subsidiarity goes hand-in-hand with concerns about judicial activism and the 'mission creep' of the ECtHR.[113] It responds to such concerns by emphasising that the contracting states will be afforded deference as to how to protect Convention rights, recognising that the Convention 'does not impose total legislative uniformity on all the participating states – which now stretch from the Protestant North to the Catholic South and on to the Orthodox and Islamic East.'[114]

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[110] Dzehtsiarou, *European Consensus*, 166. Cf. P.G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', (2003) 97 AJIL 38, fn 7.

[111] The Court initially acknowledged the subsidiary nature of the ECtHR in *Handyside v U.K.,* 7 December 1976, App. No. 5493/72, para 48; see more recently, *Austin and others v U.K.,* 15 March 2012, App. No. 39692/09 & 40713/09 & 41008/09, para 61. For extra-judicial statements see, D. Spielmann, 'Judgments of the European Court of Human Rights: Effects and Implementation', Speech at Georg-August-University, Göttingten (20 September 2013), 5-8. http://web.archive.org/web/20150806194346/http://www.echr.coe.int/Documents/Speech_20130920_Spielmann_Gottingen_ENG.pdf; P. Mahoney, 'Universality versus Subsidiarity in the Strasbourg Case law on Free Speech: Explaining Some Recent Judgments', (1997) 4 European Human Rights Law Review 364, 371; R. Spano, 'Universality or Diversity of Human Rights?', (2014) 14 HRLR 487, 491 (proclaiming that 'the next phase in the life of the Strasbourg Court might be defined as the *age of subsidiarity*').

[112] *Handyside*, paras 48-49.

[113] See for example, Conservative Party, 'Protecting Human Rights in the UK'.

[114] Mahoney, 'Universality versus Subsidiarity', 369.

It is clear that subsidiarity has indubitably been recognised as a key principle – if not the key principle – animating the functioning of the ECtHR and its relationship with the contracting parties. However, as the abovementioned quote from *Handyside* demonstrates, subsidiarity does not equate to wholesale deference. The real question is: at what point is the deference provided by subsidiarity exhausted? When one considers this in the context of standards of conduct, the question could be reformulated as follows: how should the Court determine whether the state's actions are no longer to be considered necessary, fair, or duly diligent, thus falling outside the deference provided by the principle of subsidiarity? It is in response to this question that comparative law finds its niche. Consensus provides a benchmark to determine where the limit of subsidiarity lies.[115]

iii. Standards of Conduct and External Reference

Legal standards of conduct – those provisions for which comparative law is primarily invoked – leave a wide discretion to the court applying the test to the case at hand.[116] The argument here is based on the premise that standards of conduct are qualitatively different to other legal terms, in that they 'seek to strike a balance that takes account of [an] apparently irreducible plurality of values.'[117] In the words of Neil MacCormick (writing in relation to the concept of reasonableness in tort law), '[t]he law has to express a balance between these values in general terms, and it expresses this balance by prescribing that such care has to be taken by a reasonable and prudent

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[115] Mahoney, 'Universality versus Subsidiarity', 370.

[116] Cf. O. Corten, 'Motif légitime et lien de causalité suffisant: un modèle d'interprétation rationnel du «raisonnable» (1998) Annuaire français de droit international 187, 188. Corten argues that the interpretation of 'reasonable' by international courts and tribunals does not automatically depend on 'la seule subjectivité de l'interprète, mais qu'il est susceptible de faire l'objet d'un contrôle par des tiers, et ce à l'aide de jugements de fait, et non par l'affirmation péremptoire de jugements de valeurs'. This is, at best, optimistic - Corten, for example, considers that the second stage in reasonableness analysis is the identification of a 'legitimate reason' for the act under review. Clearly, the qualification of an act as 'legitimate' or not is a deeply subjective act, even if legitimate reasons are enumerated in the treaty provision. *ibid*, 189.

[117] N. MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 167.

person.'[118] By prescribing such a standard, the law defers evaluation of the myriad different factors that are relevant to the question of acceptable conduct to particular cases. Standards of conduct reflect the acknowledgement that the law simply cannot determine *a priori* which factors should take precedence in relation to certain questions. The practice of the ECtHR demonstrates that the factors to be taken into account with regards to standards of conduct are necessarily context-dependent: whilst in most contexts, the consensus approach is followed, in different contexts, other factors have been identified as carrying more weight in determining the standard of conduct to be expected of a contracting party.[119]

Given the lack of enumerated factors that must be taken into account when interpreting standards of conduct,[120] how is the bench to approach interpretation of such a vague term? Two options are possible. First, the Court could simply give effect to its subjective values when determining what is proportionate or necessary or fair, without reference to an external source. Second, the Court could have reference to the actions of contracting parties to determine what is *actually* accepted as proportionate or necessary or fair by Council of Europe states. This would enable the Court to ensure the public and states that it has not just imposed its own subjective view as to the appropriate standard of conduct to which contracting parties should be held.

The first option would fan the flames of claims of judicial activism that have led to the criticisms that the Court faces today. Interpreting a legal standard without reference to any sources would surely be viewed as an unjustified imposition of subjective values. However, this is exactly how

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[118] MacCormick, *Rhetoric and the Rule of Law*, 171.

[119] See, *Tănase,* para 173; *Republican Party of Russia*, para 126; *A, B, C*, paras 235-41.

[120] Cf. the Unfair Contract Terms Act 1977, section 11(2) and Schedule 2, which specify factors to be taken into account when determining whether a contract term purporting to exempt a party from their contractual liabilities is reasonable.

another standard of conduct – reasonableness – is approached in the context of English and EU law, and it is instructive to reflect on why the two contexts might be different.

In *Healthcare at Home Limited v. The Common Services Agency*, the U.K. Supreme Court was faced with the interpretation of 'reasonableness' in the context of EU law. Lord Reed, delivering judgment for the Court, stated that

> [I]t would misconceived for a party to seek evidence from actual passengers on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable men, the evidence would be beside the point. The conduct of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court. The court may require to be informed by evidence of circumstances which bear on its application of the standard of the reasonable man in any particular case; but it is then for the court to determine the outcome, in those circumstances, of applying that impersonal standard.[121]

From the reasoning of the Supreme Court, three arguments for substantiating standard of conduct tests without reference to actual conduct are identifiable. First, explicit reference to an individual or group of individuals would, in the words of the U.K. Supreme Court, 'violate equality of treatment' of citizens.[122] In domestic law, a Court is faced with a pool of at least hundreds of thousands of individuals (or, as in most Council of Europe states, millions) from which standards of conduct could be induced. Considering that it would be impossible for a court to survey a sufficiently large section of the population to claim objectivity or

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[121] *Healthcare at Home Limited,* para 3.
[122] *Healthcare at Home Limited,* para 12.

representativeness, any lesser survey would give undue weight to the behaviour of those sampled. In other words, any attempt to substantiate the legal standard of conduct will necessarily breach the principle of equality. The judge is hence endowed with the responsibility to substantiate the attributes of the reasonable man on the assumption that they will be able to rise above their own biases to expound an objective standard. The extent to which this occurs is dependent on the trust that the judiciary commands in any particular jurisdiction.

Second, the absence of reference to actual conduct accords legal certainty to a standard of conduct test, which 'would be undermined by a standard which depended on evidence of the actual or subjective ability of particular [individuals].'[123] For example, if what were to be considered as 'reasonable' were assessed in relation to the particular defendant, the ability of the public to assess the standard of conduct to which they were held to would be significantly diminished.

Third, and relatedly, the doctrine of *stare decisis* allows the English courts to substantiate the standard of conduct test in relation to concrete cases that will, unless overruled, be subsequently followed.[124] The ability to refer to prior cases in the course of the Court's reasoning allows the objective standard to be constructed incrementally, alleviating claims of subjectivity that might otherwise be levelled at the bench.

Do these arguments against referring to actual conduct hold any weight in the context of the ECHR? There is one important structural difference between the two spheres of application: there are fewer subjects that make up the relevant 'society' in international law than within

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[123] *Healthcare at Home Limited,* para 12. See also Advocate General Sharpston in *Lämmerzahl GmbH v Freie Hansestadt Bremen* (Case C-241/06) [2008] 1 CMLR 19, para 66.

[124] The doctrine of *jurisprudence constante* works analogously, although not identically, in the French system.

domestic law – 47 states in the Council of Europe versus 64 million citizens in the U.K. The conduct that is generally accepted by members of the society (i.e. Council of Europe states) is therefore more easily discernable from the actions of those that constitute the society. This places the onus on the judge to justify their interpretation of the standard of conduct, as the actual standard is more verifiable than that in domestic law. If the position of a court is out of line with the prevailing views of states in the Council of Europe, it will be more readily noticeable. Put another way, subjective bias has the potential to manifest itself more clearly because – unlike domestic judges – the international judiciary cannot justify their interpretation of a standard of conduct in reference to an amorphous constituency of hundreds of thousands, or millions.[125]

Note that this also addresses both the 'equality of treatment' and 'legal certainty' arguments advanced against reference to actual conduct by the U.K. Supreme Court. The fact that the constituent elements of the pertinent society are few in number allows for a representative or comprehensive survey of the actual standard in society to be undertaken, as well as providing an observable standard that – if followed in law – will provide legal certainty.[126] This is not to say every deviation from a generally accepted standard of conduct is a result of judges' biases: for example, normative considerations could, and do, play a role in a judicial interpretation of what constitutes an acceptable standard.[127] But it does place the onus on the judge to explicate the legal standard in relation to the actual standards of conduct observable in society.

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[125] Cf. Dzehtsiarou, *European Consensus*, 164, 172; Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights', 147.

[126] Note that this presupposes a predictably stable methodology for examining consensus.

[127] Notably in this context, see *A, B, C*, paras 235-41. See also *Tanase,* para 172; *Republican Party of Russia v Russia*, 12 April 2011, App. No. 12976/07, para 126.

To link this back to the value underpinning the ECtHR, it is clear that the use of comparative law is the approach most in keeping with the principle of subsidiarity. Without reference to the accepted standards of conduct within the community, it would be impossible for the Court maintain that it was not foisting its own conception of the appropriate means by which Convention rights are to be protected upon the contracting parties. Presented with broad, undefined standards of conduct, comparative law provides an objectively verifiable benchmark against which the Court can assess the proportionality, necessity, or fairness of a state's actions.[128] By identifying these standards as the provisions for which consensus is consistently deployed, we are able to appreciate why the Court draws on comparative law and why it should do so if such an interpretation is to be considered legitimate.

CONCLUSION

The ECtHR has often had recourse to comparative law when interpreting the Convention from the late 1970's onwards. With the progression of time – and especially following the structural changes to the Court in 1998 – the use of the comparative method has become clearer and more frequent. This chapter has demonstrated that the Court mainly draws on comparative law when interpreting standards of conduct. The failure to recognise this fact has prevented previous studies from fully understanding why the Court uses comparative law and whether it should. The application of these standards must be linked to the standards accepted within the society of Council of Europe states. To do otherwise would decrease the legitimacy of the law by, for if we do not use society's conception of the 'necessary' as a benchmark, then whose are we to adopt? In a society in which such standards are observable, it seems to be unavoidable to use the actual, observable standard as a starting point for interpretation. Analysed within the legitimacy

[128] Cf. Dzehtsiarou, *European Consensus*, 210.

framework set out in Chapter 3, the use of comparative law is the option most in keeping with the fundamental value of subsidiarity when the Court is called upon to interpret standards of conduct. Moreover, the analysis conducted in this chapter lends weight to the first hypothesis adumbrated in the first chapter; namely, that the character of the law being interpreted – standards of conduct – is relevant with regards to whether extra-systemic law will be used by courts or tribunals.

The next chapter moves to address the use of comparative law by the panel and Appellate Body of the WTO within the framework of the Dispute Settlement Mechanism. By placing a premium on the stability and predictability of interpretation, the use of domestic law fulfils a notably different function within the context of the WTO to that which it serves in the ECtHR.

6.

DOMESTIC LAW AS SECURITY AND PREDICTABILITY: THE WTO

INTRODUCTION

The Dispute Settlement Mechanism ("DSM") of the World Trade Organization ("WTO") is the compulsory, binding inter-state adjudicatory system for disputes between member states related to WTO law.[1] The panels and the Appellate Body ("the AB") that work under the framework of the DSM have gained a reputation for judicious and effective dispute resolution in the international sphere, leading other courts and tribunals to hail them as a guiding light for international dispute resolution in general.[2] Although fact-intensive cases are the norm in the WTO DSM, the legal questions that come before panels and the AB are primarily questions of treaty interpretation and hence hold interest for any study of legal interpretation.[3]

By virtue of Article 3.2 of the DSU, panels and the AB must interpret the covered agreements 'in accordance with the customary rules of interpretation of public international law', which has

[1] Article 1.1/Annex 1, Dispute Settlement Understanding ("DSU"). See also Panel Report, *US-Import Measures on Certain Products from the EC* WT/DS165/R (17 July 2000), para 6.23.

[2] See for example, the Joint dissenting opinion of Judges Al-Khasawneh and Simma, *Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.)* (Judgment) (2010) ICJ Rep. 14, 113. See also J. Bacchus, 'WTO Appellate Body Roundtable' (2005) 99 ASIL Proceedings 175 (calling the Appellate Body 'an international tribunal of historical global achievement'); R. Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence' in J.H.H. Weiler (ed), *The EU, the WTO and NAFTA: Towards a Common Law of International Trade?* (OUP 2001) 35.

[3] I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 3. It should be noted that the ultimate power to interpret the WTO legal texts lies with the Ministerial Conference and the General Council of the WTO under Article IX:2 of the WTO Agreement.

been understood primarily – even if not exclusively – to refer to Articles 31 to 33 of the VCLT.[4] Reference to the customary rules of interpretation opens the door to the possibility that the applicable rules may diverge from those codified in the Vienna Convention, and the AB has in practice applied uncodified principles of interpretation, such as the principle of effectiveness or *effet utile*.[5] Nevertheless, the 'perception is that the Appellate Body has put its trust in strict adherence to the codified principles of treaty interpretation in the VCLT', augmenting the image of stability and predictability that such formal attachment provides.[6]

In principle, the provisions of the VCLT do not limit which materials may be consulted for the purposes of interpretation, instead limiting when certain materials may be ascribed significance for interpretation.[7] Domestic law could hence be used to evidence intention, ordinary meaning or the object and purpose of the treaty. However, in practice, the use of domestic law has been circumscribed.[8] This chapter will assess how domestic law has been used under the rubric of the Vienna Convention provisions, what lessons one might drawn from its invocation by the AB and panels, and how its use is to be analysed within the framework of legitimacy elaborated in Chapter 3.

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[4] See for example, Appellate Body Report, *US-Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R (29 April 1996), 17; Appellate Body Report, *Japan-Taxes on Alcoholic Beverages* WT/DS8 & 10 & 11/AB/R (4 October 1996), 10; Appellate Body Report, *India-Patent Protections for Pharmaceutical and Agricultural Chemical Products* WT/DS50/AB/R (19 December 1997), para 46. Cf. Article 17(6)(ii), Anti-Dumping Agreement, which provides that 'the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.'

[5] See for example, Appellate Body Report, *US-Continued Dumping and Subsidy Offset Act of 2000* WT/DS217 & 234AB/R (16 January 2003), para 271.

[6] Van Damme, *Treaty Interpretation,* 380.

[7] See, in relation to the *travaux préparatoires* of a treaty, J.D. Mortenson, 'The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 [4] AJIL 780. On the flexibility of the Vienna Convention provisions, see Chapter Two.

[8] One use of domestic law not elaborated in this chapter was by the Panel Report in *US-COOL,* in which the panel surveyed domestic law to confirm that consumer information provided by labeling should be recognised as a 'legitimate objective' under Article 2.2 of the TBT Agreement. Such recourse seem analogous to the ECtHR's use of domestic law to interpret standards of behaviour or justification; Panel Report, *US-Certain Country of Origin Labelling (COOL) Requirements* WT/DS384 & 386/R (18 November 2011), para 7.638.

The structure of this chapter is as follows. In the first three sections, the use of domestic law within the framework of the VCLT provisions is analysed. Section I examines the reasoning of the Panel and AB in *EC-Chicken Cuts*, in which EU law was considered to be a circumstance of conclusion of the WTO Agreement within the meaning of Article 32. Section II analyses the use of domestic law as subsequent practice under Article 31(3)(b) VCLT in the Panel Report of *US-Section 110(5) of the Copyright Act*. The following section considers the use of domestic law as evidence of a special meaning of a term under Article 31(4) in *Mexico-Telecoms*. The final section of the chapter examines the claim that the provisions of the Vienna Convention have been 'instrumental in justifying and making acceptable [the AB's] early choice to function as a court and thus to build its legitimacy as a judicial actor'.[9] It identifies security and predictability as the main values underpinning the functioning of the DSM,[10] and argues that the limited use of domestic law has been deployed in pursuance of this value.

I. Domestic Law as the Circumstances of Conclusion of a Treaty

Perhaps the most interesting use of domestic law within the WTO has been as a circumstance of conclusion of a treaty, recourse to which is permissible under Article 32 of the VCLT. Under Article 32, recourse to the preparatory works or circumstances of conclusion of a treaty are used either to confirm a meaning resulting from the application of Article 31 or to determine the meaning of a provision when the application of Article 31 leads to an unclear meaning or absurd result. What constitutes the circumstances of conclusion of a treaty is not defined in the VCLT but '[t]he circumstances that cause a treaty to be drawn up, affect its content and attach to its

[9] Van Damme, *Treaty Interpretation,* 382.

[10] Art 3.2, DSU ('the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system'). See also GATT *Panel on Newsprint* L/5680-31S/114 (20 November 1984), para 52.

conclusion are all factors which are in practice taken into account.'[11] The possibility of recourse to the circumstances of conclusion of a treaty allows the interpreter to step into the shoes of parties to the treaty and 'to take into account all the work which had led to the formation of that will – all material which the parties had had before them when drafting the final text.'[12] The circumstances of conclusion hence extend further than the preparatory works of a treaty, as they 'are intended to cover both the contemporary circumstances [of conclusion] *and* the historical context in which the treaty was concluded'.[13] The broad scope and undefined character of the circumstances that may be taken into account provides a wide degree of flexibility for the interpreter to consult a variety of materials. As has been noted, '[d]epending on the nature of the treaty, the interpreter could examine the political, economical, social, or other situation of the parties at the time of conclusion.'[14] The AB has adopted a broad understanding of the circumstances of conclusion of a treaty, stating that circumstances could include any 'event, act, or instrument',

> [N]ot only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a "circumstance of the conclusion" when it helps to discern what the common intentions of the parties were at the time of conclusion with respect to the treaty or specific provision ... not only "multilateral" sources, but also "unilateral" acts, instruments, or statements of individual negotiating parties may be useful in ascertaining "the reality of the situation which the parties wishes to regulate by means of the treaty" and, ultimately, for discerning the common intentions of the parties.[15]

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[11] Gardiner, *Treaty Interpretation*, 343.

[12] Statement of M.K. Yasseen, 873rd Meeting of the ILC, [1966] I(II) YBILC 205, para 25. Quoted in Panel Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products* WT/DS207/R (3 May 2002), para 7.35.

[13] Waldock, Third Report, 59, para 22 (emphasis added).

[14] Y. le Bouthillier, 'Article 32', in O. Corten & P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 860.

[15] Appellate Body Report, *EC-Chicken Cuts*, para 289.

This broad understanding of the circumstances of conclusion of a treaty hence accommodates recourse to a wide range of material by the interpreter. It was the acceptance that 'unilateral' acts could constitute circumstances of the conclusion of a treaty that opened the door to the use of domestic law – or, more accurately, the law of the European Union[16] – in the *EC-Chicken Cuts* case.

i. EC–Chicken Cuts

The dispute in *EC-Chicken Cuts* revolved around the interpretation of heading 02.10 of the EC Schedule of commitments, which covered 'salted' meat.[17] The complainants, Brazil and Thailand, claimed that frozen salted chicken cuts exported to the EU were being subjected to a tariff over and above that contained in the EC schedule, thereby breaching Articles II:1(a) and (b) of the GATT 1994.[18] The EU retorted that products falling under tariff heading 02.10 must have been salted for the purpose of long-term preservation.[19] The central issue before the Panel and AB was, therefore, to interpret heading 02.10 of the EC schedule: if 'salted' necessarily and exclusively meant meat salted for the purpose of long term preservation then the products at issue did not fall under heading 02.10 and were not being afforded less favourable treatment.[20] An unglamorous topic if ever there was one, although one could scarcely imagine a case that so

[16] The European Union has exclusive competence to conclude trade negotiations on behalf of EU member states, and is a member of the WTO in its own right. Although all member states of the EU are separately members of the WTO, cases in the DSM are brought against the EU and not individual member states. In effect, therefore, EU law is the analogous to the domestic law of other WTO members; *Opinion 1/94 re WTO Agreement* [1994] ECR I-5267, codified in Articles 3(1)(e) and 3(2) of the Treaty on the Functioning of the European Union.

[17] Heading 02.10 of the EC Schedule covered 'Meat and edible offal, salted, in brine, dried, or smoked'.

[18] Products falling in heading 02.10 of the EU Schedule were subject to an *ad valorem* tariff of 15.4%. The products in question were classified by the EU under heading 02.07.41.10 (boneless frozen chicken), and were hence subject to a specific tariff of €102.4/100kg as well as potentially being subject to safeguard measures under Article 5 of the Agreement on Agriculture. The complainants contended that this equated to an *ad valorem* equivalent of 40-60%; WorldTradeLaw.net Dispute Settlement Commentary, 'Panel Report, *EC-Chicken Cuts*', 2.

[19] Panel Report, *EC-Customs Classification of Frozen Boneless Chicken Cuts* WT/269 & 286/R (30 May 2005), para 7.81.

[20] H. Horn & R. Howse, 'European Communities - Customs Classification of Frozen Boneless Chicken Cuts' in H. Horn & P. Mavroidis (eds), *The WTO Case Law of 2004-2005* (CUP 2008) 10.

wholly revolved around interpretation, and one to which 280 pages of Panel and AB Reports were dedicated.

The schedules of WTO members are integral parts of the WTO Agreement and the GATT 1994 by virtue of Articles II:2 and II:7 respectively, and hence 'must be considered treaty language.'[21] Accordingly, the Panel in *EC-Chicken Cuts* considered that Articles 31 and 32 of the VCLT 'comprise[d] the legal framework within which in this interpretive exercise must take place.'[22] Neither the ordinary meaning nor the context of the word 'salted' led to the conclusion that salting must have occurred for the purpose of long-term preservation.[23] However, both the classification practice of the EC from 1996-2002 – which, in the view of the Panel, constituted subsequent practice under Article 31(3)(b) – and the object of 'stability and predictability' of the WTO Agreements led the Panel to provisionally conclude that 'salted' did not include a long-term preservation requirement.[24]

In order to confirm this interpretation, the Panel turned to the 'circumstances of conclusion' of the Uruguay Round, including EU law, judgments of the ECJ, EC explanatory notes to the schedule and previous classification practice.[25] Of particular importance was EC Regulation 535/94, which was adopted and published prior to the conclusion of the WTO Agreement, but after the conclusion of the EC tariff negotiations.[26] The Panel found that the Regulation nevertheless formed part of the 'historical background' against which negotiations took place,

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[21] Panel Report, *EC-Chicken Cuts*, para 7.87.
[22] Panel Report, *EC-Chicken Cuts*, para 7.88.
[23] Panel Report, *EC-Chicken Cuts*, paras 7.116, 7.163.
[24] Panel Report, *EC-Chicken Cuts*, paras 7.290, 7.321.
[25] The Panel followed the AB Report in *EC-Computer Equipment,* which determined that the legislation of a WTO member could constitute part of the 'circumstances of conclusion' of a treaty; Appellate Body Report, *EC-Customs Classification of Certain Computer Equipment* WT/DS62 & 67 & 68/AB/R (5 June 1998), para 94. The Panel rejected the ECJ judgments as either irrelevant (*Dinter*) or ambiguous (*Gausepohl*), and used the other materials to support the conclusion reached on the basis of Regulation 535/94.
[26] The Regulation was adopted in the 'verification period' that allowed WTO members time to check others' schedules before formal adoption in April 1994.

and that the WTO membership could be considered to have 'constructive knowledge' of the measure.[27] The Regulation altered and clarified parts of the EC's tariff classification system – the Combined Nomenclature – to effect changes necessitated by the conclusion of the Uruguay round negotiations. Specifically, Article 1 of the Regulation provided that 'For the purposes of heading No 02.10, the term 'salted' means meat ... having a total salt content of no less than 1.2% by weight.'[28] WTO members were hence presumed to have negotiated on the basis that this Regulation defined products that fell under heading 02.10, confirming the Panel's preliminary conclusion.[29] The Panel concluded by reiterating the importance of security and predictability in interpreting the WTO Agreements:

> In reaching this conclusion, the Panel recalls that a fundamental object and purpose of the WTO Agreement and the GATT 1994 is that the security and predictability of reciprocal and mutually advantageous arrangements must be preserved. In the Panel's view, [the EU's] unilateral intention regarding the meaning to be ascribed to a concession that Member has made in the context of the WTO multilateral trade negotiations cannot prevail over the common intentions of all WTO Members as determined through an analysis undertaken pursuant to Articles 31 and 32 of the *Vienna Convention.*[30]

On appeal, the AB upheld the Panel's analysis under ordinary meaning, context, and object and purpose of the treaty. However, it disagreed with the Panel that EC classification alone could qualify as subsequent practice under Article 31(3)(b).[31] Having found that interpretation under Article 31 was inconclusive, the AB moved to examine the circumstances surrounding the conclusion of the treaty 'to ascertain whether WTO Members have agreed on the preservation

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[27] Panel Report, *EC-Chicken Cuts*, para 7.361.
[28] Panel Report, *EC-Chicken Cuts*, para 7.366.
[29] Panel Report, *EC-Chicken Cuts*, para 7.340.
[30] Panel Report, *EC-Chicken Cuts*, para 7.427.
[31] Appellate Body Report, *EC-Chicken Cuts*, para 272.

criterion advanced by the European Communities'.[32] The circumstances of conclusion relevant to interpretation could, in the view of the AB, be determined by

> [A] number of objective factors ... [including] the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject mater of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty.[33]

Regulation 535/94 fit the bill: it was, in the words of the AB, a 'product description of 02.10' which reflected the common intentions of the parties in respect of tariff negotiations under that heading.[34] If a specific criterion of long-term preservation were to be included in heading 02.10, 'then there must be clear evidence that such a criterion was agreed upon by the parties for the European Communities' WTO Schedule',[35] which was not manifest in any of the materials before the AB, including Regulation 535/94.

ii. Limited to Schedules of Commitments?

Although *Chicken Cuts* demonstrates that domestic law has been considered to be a circumstance of conclusion of an integral text of the WTO Agreement, is the use of domestic law limited to the interpretation of members' schedules of commitments? The answer to that question depends in turn on whether schedules are, or should be, interpreted differently to ordinary multilateral treaty texts. This section argues that schedules are not fundamentally different from normal treaties, but that different considerations might come into play when one examines the

[32] Appellate Body Report, *EC-Chicken Cuts*, para 281.
[33] Appellate Body Report, *EC-Chicken Cuts*, para 291.
[34] Appellate Body Report, *EC-Chicken Cuts*, para 314.
[35] Appellate Body Report, *EC-Chicken Cuts*, para 344.

circumstances of conclusion of schedules on the one hand, and of multilateral treaties on the other.

Other commentators have taken a contrary view. Isabelle Van Damme has argued that schedules of commitments should be interpreted differently to treaties on the basis that schedules 'have a distinct qualifying unilateral characteristic'.[36] Similarly, Federico Ortino has claimed that 'instead of focussing on a *single* treaty text, identifying the common intention behind a member's concession cannot avoid taking into account the *unilateral* origin of such a concession as well as the existence of concessions of all other members'.[37] Is there any justified reason to say that schedules of commitments are different to multilateral treaties, and – if so – how should interpretation be approached differently?

As a result of the 'hybrid' character of members' schedules – falling somewhere between unilateral acts and treaties – Van Damme suggests that inspiration for the interpretation of schedules might be drawn from the interpretation of unilateral acts in public international law, an illustrative example of which is the case of *Anglo-Iranian Oil* before the ICJ.[38] In that case, the Court was called upon to interpret the optional clause declaration of Iran. The crux was whether the Iranian Declaration excluded treaties concluded prior to the ratification of the Declaration from the compulsory jurisdiction of the Court. The Court focussed on the 'manifest intention of Government of Iran' as the foundation for interpreting Iran's Declaration, drawing on the text

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[36] I. Van Damme, 'The Interpretation of Schedules of Commitments' (2007) 41[1] Journal of World Trade 1, 21. See also Appellate Body Report, *US-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/R (7 April 2005), para 182.

[37] F. Ortino, 'Treaty Interpretation and the WTO Appellate Body Report in *US-Gambling*: A Critique' (2006) 9 JIEL 1, 8.

[38] Van Damme, 'Interpretation of Schedules', 13-18; Van Damme, *Treaty Interpretation,* 100. Cf. Appellate Body Report, *China – Publications and Audiovisual Products* WT/DS363/AB/R (21 December 2009), para 405 ('We further note that the purpose of treaty interpretation under the *Vienna Convention* is to ascertain the "common intention" of parties, not the intention of China alone.')

and historical context to ascertain such intent.[39] Interestingly for our purposes, the Court confirmed its interpretation by referring to an Iranian domestic law that approved the declaration.[40] This law explicated the condition of Iran's acceptance of the jurisdiction of the Court in different, clearer terms than the declaration, which threw 'light on a disputed question of fact, namely, the intention of the Government of Iran at the time when it signed the Declaration.'[41] The use of domestic law was not, however, uncontroversial. Judges McNair and Hackworth critiqued the use of domestic law on the basis that it 'was a unilateral act of a legislative body of which other nations had not been appraised', the evidentiary value of which was 'slight'.[42] The core of Judge Hackworth's argument against the use of domestic law was its injurious effect of the stability of international relations:

> When a State deposits with an international organ a document accepting compulsory jurisdiction of the Court, upon which other States are expected to rely. Those States are entitled to accept that document at face value; they are not required to go back to the municipal law of that State for explanation of the meaning or significance of the international instrument. Such a procedure would in many cases lead to utter confusion.[43]

Whilst the search for other interpretive approaches that might be appropriate for the interpretation of schedules is a venture *de lege ferenda*, as a matter of practice Van Damme admits that schedules have been interpreted as a normal treaty text by WTO panels and the AB. This approach, which focuses on discerning the common intention of the parties, explains in her view why 'the Appellate Body has rejected the relevance of national laws as a means to establish the

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[39] *Anglo-Iranian Oil; Anglo-Iranian Oil Co. case (U.K. v Iran)* Preliminary Objections (1952) ICJ Rep. 93, 104, 106 ('[T]he Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.')

[40] *Anglo-Iranian Oil Co.,* Preliminary Objections, 106-07.

[41] *Anglo-Iranian Oil Co.,* Preliminary Objections, 107.

[42] *Anglo-Iranian Oil Co.,* Preliminary Objections, 121 (Individual Opinion of Sir Arnold McNair), 136 (Dissenting Opinion of Judge Hackworth).

[43] *Anglo-Iranian Oil Co.,* Preliminary Objections, 137 (Dissenting Opinion of Judge Hackworth).

meaning of the WTO covered agreement'.[44] Moreover, she eventually rejects the utility of using domestic law to interpret schedules of commitments, as 'this would imply an unacceptable and unworkable burden on disputants to know the domestic legal system of their opponents, and potentially all other WTO members'.[45]

Van Damme's analysis of the use of domestic law in the interpretation of schedules is descriptively wrong and normatively misguided. With regards to the former, the AB has actually used domestic law to discern the common intention of parties. This has been demonstrated above, when both the Panel and AB drew on EC Regulation 535/94 to interpret the EC Schedule in *EC-Chicken Cuts*. The AB has therefore not 'rejected' the use of domestic law, but has explicitly stated that not only domestic legislation but also the judgments of WTO members' courts may be relevant for the interpretation of schedules.[46]

As a normative argument, it is justifiable to emphasise the manifest intention of the member whose schedule is under interpretation when interpreting schedules. However, it would be wrong to premise this argument on an analogy between unilateral acts and schedules of commitments.[47] For unilateral acts, reference to the sole intent of the committing state is based on the fact that the intent of the declaring state alone imbues the act with legal significance (although whether unilateral acts even have legal significance is unclear).[48] This is not the case with schedules. Schedules might be concessions on the part of one WTO member state that are negotiated bilaterally, plurilaterally or multilaterally, but they only have legal force because they have been

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[44] Van Damme, 'Interpretation of Schedules', 17.
[45] Van Damme, 'Interpretation of Schedules', 17.
[46] Appellate Body Report, *EC-Chicken Cuts*, para 309.
[47] Cf Alexander Orakhelashvili, who seems to assume that schedules of commitments are unilateral acts; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 477-80.
[48] See for example, H. Thirlway, 'The Sources of International Law', in M.D. Evans (ed), *International Law* (4th edn, OUP 2014) 112; H. Thirlway, *The Sources of International Law* (OUP 2014) 21.

accepted by all members as an element of the 'package' that constitutes the WTO Agreement. If one looks at the practice of tariff negotiations, perhaps it is a fallacy to say that every concession represents a 'meeting of minds' of all members.[49] But without the ultimate assent of all parties, the legal normativity of schedules would falter.

If the source of legal normativity does not suggest an analogy with unilateral acts, could one nevertheless argue that schedules are unilaterally drafted and hence the intent of the drafting state should be privileged? To do so would be wrong for two reasons. First, the text of the schedule might have been unilaterally drafted but it certainly was not unilaterally determined. Rather, it was the result of painstaking negotiations with myriad trading partners, resulting in the agreement of the entire membership.[50] Second, the identity of the drafting party of an international legal agreement has never played a role in limiting the task of the interpreter. Legally, it is irrelevant which party drafted the text; the fact to be borne in mind when interpreting the text is that it embodies an agreement between parties.

iii. Reasonable Reliance

If the analogy with unilateral acts does not hold, why might we be interested in the domestic law of the member state whose schedule is under interpretation? An examination of the reasoning of the panel and AB in *Chicken Cuts* case is instructive. The intention of the member is not *in se* more important than the intention of any other member. What is important, on the other hand, are the external manifestations of intent that could have been reasonably relied upon by other WTO members in the process of negotiating and concluding the Uruguay Round.

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[49] Van Damme, *Treaty Interpretation*, 98.
[50] Appellate Body Report, *EC-Computer Equipment*, para 109.

Recall that, in *Chicken Cuts,* the panel and AB were at pains to emphasise the relevancy of Regulation of 535/94, which was based on *inter alia* its temporal and substantive relationship to the conclusion of the treaty. The factors of relevancy expounded by the AB – the type of act, its temporal relation to conclusion of the treaty, its subject matter, actual knowledge or mere access to the document or act, and whether it is actually used in negotiations – reflect the likelihood that other WTO members relied upon the particular event, act or instrument in their acceptance of the tariff concession. Although interpreting to give effect to the legitimate expectations of the exporting member has been explicitly rejected by the AB,[51] one would be tempted to frame the use of domestic law in the interpretation of schedules as giving effect to the *common* legitimate expectations of the WTO membership.[52] It helps construct what the WTO membership reasonably thought that they were agreeing to.[53] Such an approach accords with one of the professed objectives of the DSM; namely, to provide security and predictability for the multilateral trading system.[54]

To return to question posed at the start of the previous section, is the use of domestic laws as circumstances of conclusion limited to the interpretation of schedules due to their unique character? There seems to be no reason in principle why this should be the case. As argued above, schedules of commitments are not different from multilateral treaty texts: like all treaties,

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[51] Appellate Body Report, *India-Patents* WT/DS/50/AB/R (16 January 1998), para 45; Appellate Body Report, *EC–Computer Equipment*, paras 80-84.

[52] On the construction of the 'reasonable' common intention of WTO members, although not using domestic law, see Appellate Body Report, *US-Gambling,* para 180, fn 219 (on the reasonable inferences members can draw from the mutual exclusivity of schedule headings); Panel Report, *China-Publications and Audiovisual Products* WT/DS363/R (12 August 2009), paras 7.1205 (mutual exclusivity of schedule headings), 7.1237, 7.1246 (both on the relevance of technical possibility of electronic recording distribution in China). This is to be distinguished from the concept of 'reasonable expectation' relevant to non-violation complaints under art XXIII of the GATT; see Appellate Body Report, *India-Patents*, WT/DS50/AB/R (16 January 1998), paras 36, 41.

[53] Cf Panel Report, *US-Gambling*, para 6.125 ('[a USITC document] is undoubtedly one element in the body of evidence that the Panel can and must consider when assessing the common intentions of Members for the purpose of interpreting the scope and meaning of the US Schedule.')

[54] Article 3.2 of the DSU provides that 'the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system'. See also Appellate Body Report, *EC-Computer Equipment*, para 82; Panel Report, *EC-Chicken Cuts*, para 7.320; Appellate Body Report, *EC-Chicken Cuts*, para 243.

schedules embody agreements between parties and gain their legal validity from the consent of the WTO membership. Panels and the AB have used the 'relevant' circumstances of conclusion to provide security and predictability for the agreement that the WTO membership reasonably thought it assented to. The objective and purpose of security and predictability of trade relations is equally applicable to the 'main' WTO covered agreements (such as the GATT 1994), and hence – again, in principle – there would seem to be no reason why domestic law could not be considered as a circumstance of conclusion of those agreements.

One objection to the use of domestic law to interpret the WTO covered agreements is that such reasoning places an 'unacceptable and unworkable burden' on the WTO membership to know domestic law of all members.[55] Clearly, it would not be appropriate to place an obligation on a state to be omniscient of the domestic law of all WTO members. However, in some cases it may be acceptable to presume knowledge of the domestic law of a contracting party. The dividing line between when it is acceptable and when would be too burdensome to presume such knowledge inevitably depends on the facts of the case. However, the factors of relevancy for circumstances of conclusion expounded by the AB in *Chicken Cuts* provide a useful framework within which the burden of knowledge of domestic law can be analysed.

Let us take a hypothetical example to demonstrate this. Consider a bilateral treaty of commerce negotiated between State A and State B, whose trade was previously not legally regulated. The sole obligation in the simple treaty is that both States will lower tariffs on product X. The definition of, and current tariffs applicable to, product X are provided for in recent domestic statutes in both states which pre-date conclusion of the treaty. Clearly, this treaty has been negotiated on the basis of several presumptions enshrined in domestic law; namely, how product

[55] Van Damme, 'Interpretation of Schedules', 17.

X is defined and what the current tariffs on the product are. In such a case, discerning the common intentions of the parties cannot proceed without reference to domestic law. Using the framework of relevancy laid down by the AB, the domestic law that classified product X and detailed the previously applicable tariffs has both temporal and subject relevancy, and must have been used as the basis for negotiation of the treaty. In this case, it is clear that it would be acceptable to have reference to the domestic law as the circumstances of conclusion of the treaty. To do so would not place an 'unacceptable and unworkable burden' of knowledge upon either state. However, in the case of multilateral treaties, the criteria of relevancy – the type of act, its temporal and subject-matter proximity to conclusion of the treaty, actual knowledge or mere access to the document or event, and whether it is actually used in negotiations – will clearly be more difficult to fulfil than in the case of the hypothetical bilateral treaty, especially the last two criteria.

To conclude, the panels and AB have used domestic law to interpret schedules of commitments of WTO members, classifying such law as circumstances of conclusion of a treaty under Article 32 of the Vienna Convention. Such an approach is not dependant on any principled difference between schedules of commitments and multilateral treaty texts. Instead, the use of domestic law as a circumstance of conclusion is based on the objective of the predictability and security of multilateral trade. In effect, domestic law has been used to uphold the agreement to which the WTO membership reasonably thought that they assented to. The factors of relevancy for circumstances of conclusion of a treaty expounded by the AB in *Chicken Cuts* provide a useful framework within which to consider whether contracting parties might reasonably be expected to have relied on domestic law in any given case.

II. DOMESTIC LAW AS AGREEMENT: SUBSEQUENT PRACTICE

The second example of the use of domestic law in interpretation by the WTO is as subsequent practice under Article 31(3)(b) of the Vienna Convention. According to this provision, subsequent practice must be taken into account if it establishes the agreement of the parties regarding the interpretation of a text.[56] As one commentator has aptly noted, through this provision, '[w]ords are given meaning by deeds.'[57]

It was uncontroversial that a provision highlighting the import of subsequent practice was to be included in the VCLT.[58] As the ILC noted, 'the importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.'[59] Subsequent practice was thus conceived, alongside the subsequent agreement of parties to a treaty, as an 'authentic interpretation' of the parties which must be taken account of by an interpreter.[60] It is the agreement of states parties that separates and privileges Articles 31(3)(a) and (b) from the supplementary means of interpretation under Article 32 of the Convention.[61]

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[56] Article 31(3)(b) provides that 'There shall be taken into account, together with the context: (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'
[57] R. Gardiner, *Treaty Interpretation* (OUP 2011) 225.
[58] Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur [1964] II YBILC 59, para 23.
[59] Report of the ILC on the second part of its seventeenth session and on its eighteenth session [1966] II YBILC 221, para 15.
[60] Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur [1966] II YBILC 98-99, para 18. See also, G. Nolte, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation' UN Doc A/CN.4/660 (19 March 2013), para 30.
[61] J. Crawford, 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention', in G. Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 30. Cf. L. Crema, 'Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention', in G. Nolte (ed), *Treaties and Subsequent Practice*, 19-22.

i. The Requirements of Article 31(3)(b)

The use of subsequent practice as a means of interpretation raises two questions that are pertinent for this study: first, can domestic law qualify as 'subsequent practice'; and, second, what degree of uniformity of subsequent practice is necessary to qualify as an 'agreement' of the parties?

With regard to the former, the AB has stated that the materials permissible under Article 31(3)(b) are all those that permit the interpreter to discern a 'pattern implying the agreement of the parties regarding [the treaty's] interpretation.'[62] It is hence clear that acts attributable to the state - including the actions of the judiciary and legislature - may constitute subsequent practice, even if those acts purport to have purely internal effect.[63] The qualification of domestic law as subsequent practice makes eminently good sense when one considers that treaty obligations frequently are put into effect through domestic legislation. It is the interaction with, and application of, this implementing legislation that provides the most fertile ground for determining how states apply particular provisions of a treaty.[64]

With regard to the question of subsequent practice necessary to constitute agreement, the level of practice required need not be uniform. Clearly, all parties to a treaty could apply the provisions of the treaty in the same way and such concordant application would manifest an

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[62] Appellate Body Report, *Japan-Alcoholic Beverages*, 13. Recourse to *travaux préparatoires* is in principle not permissible to demonstrate a special meaning under Article 31(4); rather, it remains that case that recourse to preparatory material is only permissible if interpretation under Article 31 is inconclusive or would lead to absurdity; Gardiner, *Treaty Interpretation,* 291, cf. 297.

[63] Cf. Article 4, ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, as annexed to the UN General Assembly Resolution of 12 December 2001, UN Doc. A/RES/56/83. See for example, Panel Report, *US-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/R (10 November 2004), paras 6.127-30; *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (Award) (14 January 2003) XXV RIAA, 231, 257, 259; *Prosecutor v Jelisic* (Judgement) ICTY-95-10 (14 December 1999), para 61; *R v Secretary of State for the Home Department ex parte Mullen* [2004] UKHL 18, para 47 (the UKHL characterising French legislation as subsequent practice under Article 31(3)(b)).

[64] See further Gardiner, *Treaty Interpretation*, 228-30.

agreement of the parties. For example, in the *Navigational Rights* case before the ICJ, Judges Skotnikov and Guillaume considered that the actions of both Costa Rica and Nicaragua in permitting, regulating, and accepting tourist navigation on the San Juan River 'for at least a decade' amounted to uniform subsequent practice in the application of a 1858 treaty between the parties.[65] However, it is also evident that not all parties to a treaty need engage in the same practice to qualify as subsequent practice establishing agreement within the meaning of Article 31(3)(b). When the ILC explained the use of language in what was to become Article 31(3)(b), it stated that 'it omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.'[66] This is reflected in the practice of the AB, which has defined subsequent practice as 'a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding [the treaty's] interpretation'.[67]

As suggested by the quote from the ILC noted above, the possibility of constructing an 'agreement' on the basis of the tacit acceptance or acquiescence of states not engaged in the subsequent practice has been recognised.[68] For example, in *EC-Chicken Cuts,* the AB stated that

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[65] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) (2009) ICJ Rep. 213, Separate Opinion of Judge Skotnikov, para 9; Declaration of Judge ad hoc Guillaume, para 16. Judge Skotnikov placed importance on the fact that Nicaragua had regulated Costa Rican use of the San Juan river for the purposes of tourism in domestic law. The majority recognised that Article 31(3)(b) could result in an evolutive interpretation, but instead placed importance on the intention of the parties in choosing the term *'comercio'*, which had 'a meaning or content capable of evolving, not fixed once and for all'; *Navigational and Related Rights*, para 64.

[66] Report of the ILC on the second part of its seventeenth session and on its eighteenth session (1966) II YBILC 222, para 15. The ILC was discussing here the omission of the word 'all' from the phrase 'the understanding of the parties', which was to evolve into 'the agreement' of the parties in Article 31(3)(b) of the VCLT.

[67] Appellate Body Report, *Japan-Alcoholic Beverages II* WT/DS8 & 10 & 11/AB/R (4 October 1996), 13.

[68] See for example, *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) (15 June 1962) (1962) ICJ Rep. 6, 23; *Case concerning a Dispute between Chile and Argentina concerning the Beagle Channel* (18 February 1977) XXI [II] RIAA 53, para 169(a); Appellate Body Report, *EC-Customs Classification of Frozen Boneless Chicken Cuts* WT/269 & 286AB/R (12 September 2005), para 272.

> [I]n specific instances, the "lack of reaction" or silence by a particular treaty party may, in light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that is not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it.[69]

What constitutes acceptance in such a situation must be decided in light of the facts of the case at hand, taking into account factors such as the character of the legal obligation under the treaty or the awareness of states parties to the practice.[70] However, the practice must be in the public domain and accessible to all parties, even if it is not explicitly communicated to them.

ii. Domestic Law as Subsequent Practice

The Panel in *US-Section 110(5) of the Copyright Act* recognised in principle the use of domestic law as subsequent practice,[71] even though it was hesitant to cast domestic law in those terms.[72] In that case, the Panel had to determine if there was a 'minor exceptions' doctrine incorporated into the TRIPS Agreement which allowed member states to place exceptions on the rights of copyright holders in certain instances of non-profit use, such as religious ceremonies or military band performances. The U.S. defended the Copyright Act on the basis that an implicit minor

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[69] Appellate Body Report, *EC-Chicken Cuts*, para 272.

[70] G. Nolte, 'Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation' UN Doc A/CN.4/671 (26 March 2014), paras 64-70 (suggesting that 'in cases which concern treaties establishing a delimited boundary the circumstances will only exceptionally call for a reaction [from the other states parties to the treaty]'; para 65). See also J.P. Cot, 'La Conduite subséquente des Parties à un traité' (1966) 70 RGDIP 633, 645.

[71] A similar example is the Panel Report in *EC-Chicken Cuts*, in which the administrative acts - not domestic laws - of EU member states were deemed to constitute subsequent practice under Article 31(3)(b); Panel Report, *EC- Chicken Cuts* (30 May 2005), paras 7.269-71. This was overturned by the AB on the basis that the Panel erroneously deduced an agreement from the silence of other parties in response to the EU practice; Appellate Body Report, *EC-Chicken Cuts*, para 272.

[72] Panel Report, *US-Section 110(5) of the US Copyright Act* WT/DS160/R (15 June 2000). The Berne Convention was concluded in 1886 but has been revised multiple times since.

exception doctrine had been accepted by subsequent practice of parties to the Berne Convention, which formed part of the *acquis* incorporated into the TRIPS Agreement under Article 9.1.[73]

Although the Panel found that minor exceptions were not explicitly envisaged in the text of the Berne Convention, it recognised that the Convention admitted the possibility on two bases. First, it recognised that the parties to the Berne Convention had explicitly acknowledged that states parties could create minor exceptions to copyright protection in national law, which was reflected in a report of a diplomatic conference of parties.[74] In the view of the Panel, this constituted a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention. More importantly for our purposes, the Panel found confirmation for this conclusion in the practice of states to the Berne Convention, citing national laws that incorporated the minor exceptions doctrine into domestic law.[75] As a result, the Panel found that Article 9.1 of the TRIPS Agreement, which incorporated the 'entire *acquis'* of Articles 1 to 21 of the Berne Convention, also incorporated the minor exceptions doctrine.

The use of domestic law by the Panel in *US-Section 110 of the Copyright Act* seems to have been an afterthought prompted by the submissions of the parties to the case,[76] demonstrated by the equivocacy with which the Panel framed the import of subsequent practice. First, the Panel 'recall[ed] that Article 31(3) of the Vienna Convention provides that ... (b) any subsequent practice ... shall be taken into account for the purposes of interpretation.'[77] However, after

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[73] Panel Report, *US-Section 110(5),* para 6.37. Article 9.1 of the TRIPS Agreement provides that 'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto...'

[74] Panel Report, *US-Section 110(5),* para 6.53. The relevant report dated from the Brussels Diplomatic conference of the parties, held in 1948.

[75] Panel Report, *US-Section 110(5),* fn 67. The Panel noted the domestic law of Australia, Belgium, Denmark, Finland, New Zealand, Philippines, India, Canada, South Africa, and Brazil.

[76] Panel Report, *US-Section 110(5),* para 6.55 ('We note that the parties and third parties have brought to our attention several examples from various countries of limitations in national laws based on the minor exceptions doctrine').

[77] Panel Report, *US-Section 110(5),* para 6.55.

having cited domestic laws incorporating the minor exceptions doctrine, the Panel Report stated in an accompanying footnote that '[b]y enunciating these examples of state practice we do not wish to express a view on whether these are sufficient to constitute 'subsequent practice' within the meaning of Article 31(3)(b) of the Vienna Convention.'[78] The Panel hence used domestic law as confirmation for a prior finding under Article 31(3)(a), noting its pertinence as subsequent practice but failing to conclusively find that such practice constituted an 'agreement'.[79]

iii. A High Threshold

Whilst domestic law was used as mere confirmation of a decision made on other grounds, *US-Section 110(5)* demonstrates a certain openness on the part of the Panel to frame domestic law as subsequent practice. The threshold for use of domestic law is high when Article 31(3)(b) is explicitly drawn upon as authority for an interpretive proposition: it must evidence an agreement of parties regarding the application of a treaty provision. Recall that it is this consensualist element that justifies the obligatory character of Articles 31(3)(a) and (b), separating those provisions from the discretionary interpretive aids available under Article 32.

Luigi Crema and Georg Nolte have noted that courts and tribunals have had recourse to subsequent practice that cannot be said to constitute an agreement of the parties, invoking a broader type of subsequent practice.[80] It is incontrovertible that the practice of states parties to a treaty might have relevance to interpretation if it falls below the threshold of establishing an agreement, as was seen in the case of *EC-Chicken Cuts* above. However, to frame it in terms of Article 31(3)(b) would be incorrect. It would not be in keeping with the idea that Articles 31(3)(a) and (b) are privileged aids to interpretation, on the basis that they constitute authentic

[78] Panel Report, *US-Section 110(5),* fn 68.
[79] Indeed, it was not necessary for the Panel to take this step as it had already noted a subsequent agreement recognizing the minor exceptions doctrine.
[80] Crema, 'Subsequent Agreements and Subsequent Practice', 19-22; Nolte, 'Second Report', paras 106-07.

interpretations of the parties. As James Crawford has noted, Article 31(3)(b) is 'very strictly within the framework of the consensualist vision of the law of treaties.'[81] It is this character which justifies the imperative – 'There *shall* be taken into account...' – contained in the chapeau of Article 31(3). If the use of domestic law falls short of evidencing an agreement in subsequent practice, it cannot and should not be framed in terms of Article 31(3)(b).

III. Domestic Law as Agreement: Special Meaning

In a similar vein to the use of domestic law to demonstrate an agreement manifest in subsequent practice, domestic laws could also been used to determine whether a special meaning should be attributed to a term under Article 31(4) of the VCLT. This provision has been described by some as the 'reintegration' of the intentions of the parties back into the general rule of interpretation enunciated in Article 31, overriding the presumption that the text constitutes the best embodiment of the common understanding struck by the parties.[82] To label Article 31(4) in such terms overemphasises the uniqueness of the provision and neglects other expressions of the intention of the parties – upon which Article 31(4) must theoretically be based – that are integrated into the other sections of the 'general rule', such as subsequent agreements and practice under Articles 31(3)(a) and (b).

i. Article 31(4)

In the academic literature and case law, the term special meaning has been used to refer to two similar but nevertheless distinct phenomena. First, 'cases in which the term at issue is a technical one that is in common use in its field, and which the parties can be presumed to have been aware

[81] Crawford, 'A Consensualist Interpretation', 31.
[82] J.-M. Sorel & V. Boré Eveno, 'Article 31' in O. Corten & P. Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* vol. 1 (OUP 2011) 828.

of';[83] and, second, terms that are given a particular meaning by the parties to the treaty that diverges from the commonly understood meaning or meanings of the terms.[84] Certainly, the former seems capable of being understood as the ordinary usage of a term in a particular, technical context. The line between the 'ordinary meaning' of a term in its context under Article 31(1) and the 'special meaning' of a term under Article 31(4) is hence blurred. The main difference between the two provisions is the allocation of the burden of proof required to evidence a special meaning, which lies with the party advancing that meaning.[85] This factor was the primary consideration that advocated in favour of a separate provision for 'special meanings', distinguishing it from interpretation under Article 31(1).[86]

There is no reason in principle why the materials used to establish an agreement under Articles 31(3)(a) and (b) should be different to those used to evidence agreement of the parties regarding a special meaning, as all are considered to be manifestations of the intention of the parties, which displaces the ordinary meaning. Recall that the materials permissible under Article 31(3)(b) are all those that permit the interpreter to discern a 'pattern implying the agreement of the parties regarding [the treaty's] interpretation.'[87] As argued above, this does not preclude reference to domestic law; instead, an examination of the national law of states parties to the agreement may be instructive in assessing whether the parties intended a term to have a special meaning.

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[83] Panel Report, *Mexico-Measures Affecting Telecommunications Services* WT/DS204/R (2 April 2004), para 7.169.

[84] J. Stone, 'Fictional Elements in Treaty Interpretation - A Study in the International Judicial Process', (1955) 1[3] Sydney Law Review 344, 356; Gardiner, *Treaty Interpretation,* 291.

[85] ILC, *Draft Articles of the Law of Treaties with commentaries* [1966] II YBILC 177, 222.

[86] ILC, *Draft Articles of the Law of Treaties*, 222. See also [1966] I [II] YBILC 198, para 3. Initially, it was also proposed that a special meaning could only be established in light of 'decisive proof'; Waldock, Third Report, 57. This was later dropped following protestations by the US; see ILC, Law of Treaties: Comments by Governments on Parts I, II and III of the Draft Articles on the Law of Treaties drawn up by the Commission at its fourteenth, fifteenth and sixteenth sessions [1966] II YBILC 93.

[87] Appellate Body Report, *Japan-Alcoholic Beverages*, 13. Recourse to *travaux préparatoires* is in principle not permissible to demonstrate a special meaning under Article 31(4); rather, it remains that case that recourse to preparatory material is only permissible if interpretation under Article 31 is inconclusive or would lead to absurdity; Gardiner, *Treaty Interpretation,* 291, cf. 297.

ii. Mexico–Telecoms

The reasoning of the Panel in *Mexico-Telecoms* provides an illustrative example. In that case, the Panel was called upon to interpret provisions of the Telecommunications Reference Paper,[88] which formed an integral part of Mexico's schedule of commitments under the General Agreement on Trade in Services (GATS). The Panel was required to interpret if Mexico's commitment to liberalise telecommunications services was limited to domestic interconnections, or also covered cross-border provision of services (for example, from a U.S. telecoms firm inbound to a Mexican firm). The terms that were the focus of the interpretive enquiry – and the ones which qualified the inscribed telecommunications commitments of Mexico – were 'linking' and 'interconnection'. In particular, Mexico contended that those terms only referred to domestic connections, excluding Mode 1 provision of services (cross-border supply) from the purview of Mexico's commitments.[89]

After noting that the ordinary meaning of 'linking' did not limit the commitments to domestic service producers, the Panel examined if 'interconnection' could circumscribe the ordinary meaning of the term.[90] Without further enquiry, the Panel classified interconnection as a technical term capable of possessing a special meaning under Article 31(4). The Panel examined a telecommunications dictionary before continuing to state that 'the term "interconnection" also appears as a technical term with a possible "special meaning" in national laws and regulations'.[91]

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[88] The Telecommunications Reference Paper was negotiated by WTO members, laying out principles of competition regulation in the telecoms sector. It does not formulate an integral part of the GATS, but has been accepted – either partially or in its totality – by 69 WTO members, which inscribe acceptance into their schedules of commitments under Article XVIII GATS; see further D.J. Neven & P.C. Mavroidis, 'Mexico-Measures Affecting Telecommunications Services (WT/DS204/R: DSR 2004:IV, 1537): A Comment on "El mess in TELMEX"' in H. Horn & P.C. Mavroidis (eds), *The American Law Institute Reporters' Studies on WTO Case Law: Legal and Economic Analysis* (CUP 2007) 765.

[89] Panel Report, *Mexico-Telecoms,* paras 4.9, 4.16.

[90] Panel Report, *Mexico-Telecoms,* para 7.108. The Panel treated 'interconnection' as an element of the context of 'linking'; however, the term was itself subject to interpretation on its own.

[91] Panel Report, *Mexico-Telecoms,* para 7.110.

The Panel made reference to Mexico's Federal Telecom law and rules issued by the Mexican Federal Communications Commission, neither of which limited interconnection with foreign networks from the scope of the term. This confirmed that 'the term "interconnection" is used by Mexico *in its domestic affairs* for interconnection between domestic networks, *and* between domestic and foreign networks.'[92] The Panel continued to state that it had 'not been provided evidence of laws or regulations of other Members which offer definitions or usage that indicate that the definition of "interconnection"' suggests limitation to solely domestic connections.[93] On the contrary, the Panel had before it evidence that other members defined the term broadly, which it illustrated by reference to the EU Market Access Directive.[94] The Panel continued the analysis under Articles 31 and 32 of the Vienna Convention, which confirmed its preliminary conclusion regarding the interpretation of the Mexico's commitments.

The reasoning of the Panel raises some interesting points regarding interpretation under Article 31(4). First, the Panel's assessment of the term 'interconnection' seems somewhat muddled. Whilst the Panel asserted that interconnection was capable of having a special meaning if the parties so intended, it continued to state that 'since the provision is a technical one that appears in a specialized service sector, we are entitled to examine what "special meaning" it could have in the telecommunications context...'[95] This conflates two distinct lines of enquiry: 'special meaning' intended by the parties, and 'special meaning' that results from the use of a term in a particular context. The latter variant – perhaps more appropriately called a 'technical' meaning – may be elucidated without reference to Article 31(4). This is because the AB has taken a wide approach to the relevant context that should be taken into account when determining the ordinary

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[92] Panel Report, *Mexico-Telecoms,* para 7.110 (emphasis added).
[93] Panel Report, *Mexico-Telecoms,* para 7.111.
[94] Panel Report, *Mexico-Telecoms,* para 7.111. It was the US that invoked the EC Directive before the Panel; *ibid*, para 4.13.
[95] Panel Report, *Mexico-Telecoms,* para 7.108.

meaning of a term under Article 31(1).[96] The 'special' meaning of interconnection in the context of telecommunications need not therefore make reference to the intentions of parties or Article 31(4).

If the technical meaning of a term may be elucidated under Article 31(1), why did the Panel refer to Article 31(4) at all? Moreover, how does reference to Mexican domestic law fit in this picture?[97] A clearer understanding of these elements is gained when two circumstances of the case are borne in mind: first, that the Panel was interpreting an integral part of Mexico's GATS schedule; and, second, the reversed burden of proof under Article 31(4).

With regard to the former, as noted in Section I, there is a plausible claim that the domestic law of the member whose schedule is being interpreted should be taken into account insofar as other WTO members may reasonably have relied on it in the process of negotiation and conclusion of the WTO Agreement. Mexico's domestic law hence might be relevant if it directly influenced other parties' understanding of the term 'interconnection' in the negotiation and acceptance of Mexico's GATS commitments.

In relation to the reversed burden of proof, Mexico contested that the meaning of interconnection in the Reference Paper diverged from the commonly understood 'broad technical definition' of that term; in other words, it argued for a meaning of the term other than its contextualised ordinary meaning.[98] Recall that the party claiming divergence from this

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[96] See, in particular, the acknowledgement of the pertinence of 'factual context' by the AB in *EC-Chicken Cuts*; Appellate Body Report, *EC-Chicken Cuts*, paras 175-76. See also Appellate Body Report, *US-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* WT/DS166/AB/R (22 December 2000) para 105; Panel Report, *US-Import Prohibition of Certain Shrimp and Shrimp Products (Article 21.5)* WT/DS58/RW (15 June 2001) para 5.51; Van Damme, *Treaty Interpretation,* 269-72.

[97] Note that in pleadings before the Panel, the pertinence of Mexican domestic law was framed in terms of 'circumstances of conclusion'; Panel Report, *Mexico-Telecoms,* para 4.40.

[98] Panel Report, *Mexico-Telecoms,* para 4.9.

meaning carries the burden of proving the special meaning under Article 31(4). In this case, it was Mexico that claimed the meaning diverged from the common usage and hence it was Mexico that had to demonstrate agreement of such divergence. Whilst it could not demonstrate this agreement on the basis of technical definitions, it might have been relevant if Mexican domestic law defined interconnection in a restrictive way and if other WTO members were – or should have been – apprised of this. Guidance as to whether it was reasonable for other members to have such reliance might be provided by the factors of 'relevancy' in the *Chicken Cuts* AB report. The absence of such a definition falsified the claim that interconnection had a restricted meaning in any context.

It may be questioned why reference to domestic law took place under the rubric of Article 31(4) and not under Article 32, as in the *Chicken Cuts* case. This was necessitated by the argument of Mexico. As noted previously, within the framework of the VCLT recourse to the circumstance of conclusion of a treaty is only possible if interpretation under Article 31 leaves ambiguity or leads to absurdity. In *Mexico-Telecoms*, neither scenario was present: the ordinary meaning of the term in its context was perfectly clear. Instead, it was Mexico's argument that this meaning should be displaced. Article 31 allows for such divergence in cases of authentic interpretation under Articles 31(3)(a), (b), and 31(4), should parties be in agreement. Mexico's domestic law was hence assessed in the context of the search for an agreement that might displace the ordinary meaning under Article 31(1).

iii. The Utility of Domestic Law under Article 31(4)

What lessons can we draw from the Panel Report in *Mexico-Telecoms*? First, the Report re-iterates that domestic law may be relevant for interpretation carried out under the rubric of Article 31. When considered in light of the use of domestic law in the *US-Section 110(5)* case, the role of domestic law under Article 31 becomes clearer. Although there is no reason in principle why

domestic law cannot assist in elucidating an ordinary meaning under Article 31(1), it has very rarely – if ever – been used to do so.[99] The reason for this is evident: it is more efficacious to find the 'ordinary meaning' of a term by other means than surveying the use of the term by all WTO members. In the words of one commentator, a dictionary essentially plays the role of a 'statistical report' in this sense.[100] On the other hand, when a different meaning or an 'authentic interpretation' might have displaced the ordinary meaning of the term, an enquiry into the intention of parties – possibly evidenced in domestic law – is called for. This was the case with the *US-Section 110(5)* and *Mexico-Telecoms*. The absence of a restrictive definition of interconnection in Mexico's federal telecommunications law precluded it from advancing a claim of 'special meaning' under Article 31(4).

Second, *Mexico-Telecoms* highlights the conclusion drawn in Section I; namely, that the domestic law of the member whose schedule is under interpretation might be particularly relevant in certain circumstances. Indeed, the fact that Mexico's schedule was being interpreted provided the basis for the relevance of the domestic law. Unlike *EC-Chicken Cuts, Mexico-Telecoms* provides us not with an example of when the domestic law supports a certain interpretation, but rather illustrates how domestic law might be used to preclude an interpretation posited by one party. This is clearer if we consider the counterfactual scenario: as noted above, if interconnection was defined restrictively, WTO members might reasonably be considered to have accepted Mexico's GATS commitments on the basis of that definition. This would call for an analysis of the

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[99] One potential example of the use of domestic law to evidence an ordinary meaning is the report of the AB in *US-FSC (Article 21.5)*, in which the AB was called upon to interpret 'foreign-source income' in footnote 59 of the SCM Agreement. Finding that international instruments did not define the term uniformly, the AB derived 'assistance from [the] widely recognized principles which many States generally apply in the field of taxation'; Appellate Body Report, *US-Tax Treatment for "Foreign Sales Corporations" (Article 21.5 - EC)* WT/DS108/AB/RW (14 January 2002), paras 141-42, fn 121.

[100] S Fish, 'Intention is all there is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law' (2008) 29(3) Cardozo L Rev 1109, 1123. See for example, Panel Report, *US-Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Article 21.5)* WT/DS285/RW (30 March 2007), para 6.13; Van Damme, *Treaty Interpretation,* 227 *et seq*.

circumstances surrounding the domestic law in a fashion analogous to the 'relevancy' test for circumstances of conclusion espoused by the AB in *EC-Chicken Cuts*. It was not, however, necessary for the Panel to elaborate such a test, as even the Mexican domestic telecommunications law did not adopt a restrictive definition.

IV. Security and Predictability in International Trade

As was noted in Chapter 2, the Vienna Convention allows great flexibility with regards to which interpretive aids to consult. This chapter has demonstrated how domestic law has been used under the rubric of Articles 31 and 32 of the VCLT by the WTO. However, it remains to be seen whether this constitutes legitimate interpretation. Recall that in Chapter 2, it was argued that the provisions of the VCLT accommodate a wide range of interpretive methodologies, and hence cannot be used as an evaluative framework for interpretation. It is only after we recognise the values underpinning a legal regime that we can truly assess whether an interpretation will be accepted by subjects of that system. Whilst some have contended that adherence to the provisions of the VCLT has augmented the legitimacy of the DSM,[101] what are the values that the WTO has deployed Articles 31 and 32 in pursuance of and is the use of domestic law congruent with such values?

i. Interpretive Authority and Procedural Justice

As with the previous chapters, the framework of analysis adopted in this chapter will be the tri-partite definition of legitimate interpretation elaborated in Chapter 3, the first two elements of which are interpretive authority and procedural justice.

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[101] Van Damme, *Treaty Interpretation,* 382. See also, J. Klabbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization', (2005) 74 Nordic JIL 405, 412-13.

In relation to interpretive authority, WTO members are obligated to accept the provisions of the DSU, which constitutes Annex 2 of the WTO Agreement. By consenting be bound by the provisions of the WTO Agreement, states therefore also consent to be bound by the provisions of the DSU, which includes the exclusive, binding jurisdiction of the DSM. As noted in Chapter 3, consent to have a matter adjudicated upon (including any interpretive matters that might arise) entails a duty to obey the court or tribunal's decision. As a result of the 'package agreement' of WTO membership, the panels and AB have interpretive authority with respect to the covered agreements listed in Appendix 1 of the DSU.

With respect to the second element of legitimacy, the Working Procedures of the panels and AB and related documents fulfil the minimum requirements to meet the rigours of procedural justice.[102] For example, both parties are able to present their case in written and oral form,[103] evidence can be submitted and commented on by both parties,[104] private counsel may represent WTO members,[105] and appeal from panel reports to the AB on points of law is possible. The main criticism of the procedure of the DSM has been lack of transparency – deliberations of the panels and AB are confidential, hearings are generally not open to the public (unless both parties consent to hold open hearings), and written submissions are not made available to non-parties to the case.[106] Although such concern is understandable, public transparency is not one of the elements of procedural requirements listed in Chapter 3; indeed, it is widely accepted that tribunals that are not open to the public (such as the U.K. Special Immigration Appeals Commission) may meet the minimum standards of procedural justice. The DSM of the WTO

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[102] The working procedures for panels are laid out in Appendix 3 of the DSU, and are supplemented as each panel sees fit. For example, see Panel Report, *US-Steel Safeguards* WT/DS248/R (11 July 2003), para 6.1; Working procedures for Appellate Review WT/AB/WP/6 (16 August 2010).

[103] Appendix 3, arts 4, 5, 7, 10 DSU. See also art 12.7 DSU (requirement to provide reasons).

[104] However, the DSM lacks specific rules on evidence; A. Yanovich & W. Zdouc, 'Procedural and Evidentiary Issues', in D. Bethlehem *et al* (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 359-61.

[105] Appellate Body Report, *EC-Bananas III* WT/DS/27/AB/R (9 September 1997), para 12.

[106] Arts 14.1, 18.2 DSU.

therefore raises no issues of systemic procedural impropriety that may impinge on the perceived legitimacy of a decision.

ii. The Values Underpinning the WTO DSM

As with the previous two case studies, the congruence of the interpretation with the values that the dispute settlement regime upholds is the pivotal element for interpretive legitimacy. The values that underpin the WTO DSM are easy to discern. As noted at the start of this chapter, this is most clearly stated in Article 3.2 of the DSU, which reads 'The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.'[107]

Not only have WTO members emphasised the importance of the security and stability, but panels and the AB have also acknowledged and strove to uphold this value. For example, in *Japan-Alcoholic Beverages II,* the AB stated that 'WTO rules are reliable, comprehensible and enforceable ... They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO...'[108]

Moreover, this value is reflected in the general interpretive method adopted within the WTO. In the words of Georges Abi-Saab, the process of interpretation has been conceived of as 'a rigid sequence of autonomous or discrete steps, each of which has to be explicitly addressed and

[107] See also J.T. Fried, '2013 in WTO Dispute Settlement: Reflections from the Chair of the Dispute Settlement Body', https://www.wto.org/english/tratop_e/dispu_e/jfried_13_e.htm; P. Lamy, 'The AWCL at Ten - Looking Back, Looking Forward' (4 October 2011), https://www.wto.org/english/news_e/sppl_e/sppl207_e.htm.
[108] Appellate Body Report, *Japan-Alcoholic Beverages II,* 31. See also, Appellate Body Report, *EC-Computer Equipment*, para 82; Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review* WT/DS224/AB/R (15 December 2003), para 82; Appellate Body Report, *US-Stainless Steel (Mexico)* WT/DS344/AB/R (30 April 2008), para 160.

'exhausted' before moving onto the next one.'[109] Unlike the crucible approach envisaged by Waldock and the ILC, this step-by-step approach examines sequentially the ordinary meaning of the term, then the context, the object and purpose, other elements of Article 31 that might be relevant to the case in hand (such as subsequent practice or the intention of parties to adopt a special meaning), and – if necessary – subsidiary material permitted under Article 32.[110] By approaching the provisions of the Vienna Convention thus, the AB creates not only the impression of security but also renders the interpretive demarche of the AB more predictable for parties within the DSM. The emphasis placed on contextualised ordinary meaning as the presumptive meaning of a text, to be displaced only if convincing evidence is adduced that demonstrates divergence from this meaning is justified, enables WTO members to reasonably foresee the result of an interpretive question that might arise in the DSM.

iii. Domestic Law as Security and Predictability

Is the abovementioned use of domestic law congruent with the values of security and predictability that have been identified as pivotal to the functioning of the DSM? The acceptance of domestic law as relevant to interpretation is underpinned by the idea that those laws either demonstrate reliance on a certain understanding of the treaty norm on the part of the state (in the case of Articles 31(3)(b) and 31(4)) or induce reliance on the state's represented understanding of the norm on the part of other states (in the case of Article 32).

In relation to subsequent practice, domestic law is relevant if it helped established 'a discernable pattern implying the agreement of the parties regarding [the treaty's] interpretation'.[111] Similarly,

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[109] G. Abi-Saab, 'The Appellate Body and Treaty Interpretation', in G. Sacerdoti *et al.* (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP 2006) 459.
[110] See for example, Appellate Body Report, *EC-Chicken Cuts,* paras 170-346; Appellate Body Report, *US-Softwood Lumber IV*, paras 58-67; Appellate Body Report, *US-Gambling*, paras 164-67, 179-213.
[111] Appellate Body Report, *Japan-Alcoholic Beverages II* WT/DS8 & 10 & 11/AB/R (4 October 1996), 13.

with regards to special meanings under Article 31(4), the party claiming divergence from the ordinary meaning must adduce evidence that parties intended for a term to have a special meaning.[112] Domestic law is only pertinent insofar as it establishes or – as in the case of *Mexico-Telecoms* – refutes this claim. Similarly, in *EC-Chicken Cuts,* it was only because Regulation 535/94 was publicly available, and temporally and substantively proximate to the EC Schedule of Commitments, that it was deemed a relevant circumstance of conclusion.[113] The criteria laid out by the AB for 'relevancy' goes directly to the likelihood that other states will have relied on that act or document as a representation of the State's understanding of a treaty term.

To conclude, domestic law has been used as a tool, drawn upon when the domestic law manifests the agreement of the parties, or if the domestic law constitutes a 'relevant' circumstance of the conclusion of the treaty. By using domestic law within these limits, the WTO may further the security and predictability of the world trading system by giving effect to the agreements that members intended to agree to, or those that they reasonably thought that they were agreeing to. Within these relatively strict confines, the use of domestic law in interpretation by the WTO is legitimate.

CONCLUSION

The three examples analysed in this chapter highlight how domestic law has been used within the framework of the Vienna Convention articles to promote a certain value; in this case, security and stability. It demonstrated how the use of domestic law has been acknowledged as relevant to establishing the agreement of the parties, both within the scope of Article 31(3)(b) and Article 31(4). The AB also recognised the use of 'relevant' domestic law as a circumstance of conclusion

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[112] ILC, *Draft Articles of the Law of Treaties with commentaries* [1966] II YBILC 177, 222.
[113] Appellate Body Report, *EC-Chicken Cuts*, para 314.

within the meaning of Article 32. 'Relevancy' in this sense was understood to be determined by reference to a number of factors, including: the type of legal instrument; its temporal and subject proximity to the treaty matter; knowledge of or access to the domestic law by other parties; and actual influence of the domestic law on treaty negotiations. The use of domestic law within the framework of these articles promotes the security and predictability of the multilateral trading system by giving effect to the understanding of a treaty term that was established by the agreement of the parties (either prior or subsequent to the conclusion of the treaty), or giving effect to the understanding of treaty term that parties could reasonably have relied on in the contexts of treaty negotiations.

CONCLUSION

In the Introduction to this thesis, two questions were posed. First, is domestic law used in the interpretation of international law; and, second, is it permissible to use domestic law? After analysing the practice of the three tribunals examined in Part Two, we are now in a position to respond to these questions.

I. IS DOMESTIC LAW USED TO INTERPRET INTERNATIONAL LAW?

It is clear from the practice of the ICTY, ECtHR, and panels and AB of the WTO that domestic law is used to interpret international law, even if that domestic law does not evidence a rule of customary international law or a general principle of law. The diversity of situations canvassed in this thesis is in no way exhaustive, but demonstrates that the comparative technique has been adopted in diverse situations by a variety of international jurisdictions. This section revisits the hypotheses posited at the end of Chapter One to provide an overview of the findings made in Part Two of this thesis.

i. The Character of the Law Interpreted

The literature surveyed in Chapter One supported the idea that some laws were more likely to be interpreted by reference to foreign law if they were of a universal character (such as human rights) or if they had been transplanted from a foreign jurisdiction into domestic law (for example, the transposition of the German Contract Insurance Act into Austrian law).[1] Similarly, in international courts and tribunals, the character of the law interpreted affects the propensity of

[1] Chapter One, text accompanying fns 123-25, 144-45.

tribunals to use domestic law. Three examples from Part Two of this thesis lend support to this proposition.

First, Chapter Four examined the development of the crime of rape by the ICTY. In both *Furundzija* and *Kunarac*, the Trial and Appeal Chambers of the ICTY drew on domestic law to create the definition of rape that was absent in conventional and customary law. Against the background of a bare-bones statute and minimal precedent, the Tribunal had little choice but to have recourse to external sources in order to hold those responsible for serious violations of the laws of war to account via a judicial process. The crime of rape in international criminal law has clear parallels with the crime under domestic law, even if the application and scope of the crimes are not identical. It was this manifest similarity between the rule in domestic law and international law that paved the way for the chambers of the ICTY to have recourse to domestic law when interpreting the international crime.[2]

Second, the interpretation of legal institutions that have been transposed from domestic criminal systems into the Statute and RPE of the ICTY provides an illustrative example of how the origins of a legal rule might facilitate the use of domestic law. In *Erdemovic* and *Blaskic,* the common law origins of the guilty plea and *subpoena* provided both a justification for the use of domestic law and delimited the scope of the comparative survey carried out by the Tribunal. The very fact that these institutions were imported into international criminal procedure suggests that the object and purpose they served in domestic law was identified as responding to the need of the Tribunal. As a result, tribunals have found it instructive to refer to the functioning of the transposed institution in its 'donor' environment, even if allowance is made for the institutional particularities of the 'recipient' legal system.

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[2] Cf. F.O. Raimondo, 'General Principles of Law, Judicial Creativity, and the Development of International Criminal Law', in S. Darcy & J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 47.

Third, the use of domestic law by the ECtHR provides an example of how the character of the international rule might facilitate reference to domestic law even if it has no analogues or origins in domestic law. Chapter Five demonstrated that the Grand Chamber of the Court referred to comparative law in 33% of judgments handed down in the ten-year period from 2005 to 2015. In 73.3% of these judgments, comparative law was used to interpret 'standards of conduct' – such as necessity, fairness, or due diligence – that aim to 'strike a balance that takes account of [an] apparently irreducible plurality of values.'[3] What is necessary or fair cannot be enumerated in a checklist that the interpreter diligently crosses off as the appropriate evidence is adduced. Rather, they are context-dependent values that leave a wide discretion to the interpreter. The question is how to appropriately exercise this discretion.

In Chapter Five, the interpretation of standards of conduct in domestic legal systems and in the ECtHR was contrasted. In the former, reference to the actual behaviour of citizens is rejected on the basis that it would violate the equality of treatment of citizens.[4] To interpret such a provision in reference to the standards of only a small, inevitably unrepresentative, proportion of the population would privilege the subjective preferences of the few individuals whose conduct was adduced before the court. In the ECtHR, on the other hand, it is entirely feasible to examine what standards of conduct are accepted by the 47 subjects (i.e. contracting parties) within that legal system. To interpret standards of conduct otherwise would be to foist the Court's own conception of what is necessary, fair, or duly diligent upon states in violation of the principle of subsidiarity. This requires that the Court's comparative survey is representative, if not comprehensive, of the approaches of states. Otherwise the violation of equality argument that finds purchase in domestic law applies equally here. It should be emphasised that Chapter Five

[3] N. MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 167.
[4] *Healthcare at Home Limited v. The Common Services Agency* [2014] UKSC 49, para 12.

does not contend that the approaches of Council of Europe states should be unquestioningly deferred to by the ECtHR, but simply that reference to the domestic law of states is the inevitable starting point for interpretation.

To conclude, the character of the law interpreted facilitates the use of domestic law in some circumstances, three of which are outlined above. Just as the origins of a law provide justification for reference to foreign law in the case of national courts, so too does it provide justification for the use of domestic law for international courts and tribunals. It should be noted that the purported universality of human rights norms do not seem to provide a justification for recourse to domestic law; instead, the ECtHR uses domestic law in order to substantiate standards of conduct included in the Convention.

Whilst the character of the law interpreted provides the basis for recourse to domestic law in some instances, it is not always the case. The practice of the WTO examined in Chapter Six, for example, demonstrates that domestic law may be invoked when the international law interpreted finds neither analogue nor origin in domestic systems, nor when the law embodies a standard of conduct.

ii. System Building

Chapter One identified certain deficiencies in the legal system – inflexibility to adapt to societal change, incoherence of the legal system with the political values of society, and the absence of legislation on a certain point – as factors that increase the propensity of domestic courts to refer to foreign law. In these scenarios, foreign law is adduced to help remedy deficiencies in the domestic law due to an absence of intra-systemic sources. For example, as the Czech Republic and Slovakia transitioned from communist to liberal democratic states in the early nineties, courts were left without law or scholarship that embodied the new values of society. As a result,

the Czech and Slovak courts drew on sources from outside their own systems, including foreign law, to develop new legal principles that accorded more readily with the new polity.[5]

The absence of applicable intra-systemic sources of law was clearly a motivating factor behind the use of domestic law by the ICTY. The ICTY was the first international criminal tribunal created since the International Military Tribunals at Nuremberg and Tokyo and as a result was faced with scant precedent upon which to build, both in terms of substantive law and procedure.[6] The idea that domestic law could be used to fill the gaps in international criminal law and procedure was perhaps most clearly pronounced by majority opinion of Judges McDonald and Vohrah in *Erdemovic*. In that case, the judges outlined a three-step process for interpreting the Statute and RPE of the Tribunal: first, recourse should be had to Articles 31 and 32 of the VCLT; if that proves to be unfruitful, one may look to other 'international authorities', such as the case law of other tribunals; finally, if international authorities are 'entirely lacking or insufficient', the chamber may look to national law.[7] The *Furundzija* Trial Chamber adopted a similar line of reasoning, which acknowledged the absence of an adequate definition of rape in international conventions, custom and case law before then moving to draw on domestic law to elaborate a definition.[8]

The diminishing use of domestic law by the *ad hoc* international criminal tribunals and the International Criminal Court (ICC) suggests that domestic law was adduced to build precedents

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[5] M. Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013) 255, 263-64.

[6] *Statement by the President of the ICTY Made at a Briefing to Members of Diplomatic Missions* (11 February 1994) IT/29, reprinted in V. Morris & M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for The Former Yugoslavia* vol. 2 (Transnational Publishers 1995) 649.

[7] *Prosecutor v Erdemović* (Trial Chamber Transcript) IT-96-22-T (31 May 1996), Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 5.

[8] *Prosecutor v Furundžija* (Trial Chamber Judgement) IT-95-17/1-T (10 December 1998), para 175.

that subsequent chambers could refer to.[9] Yet without chambers' initial recourse to domestic law, the international criminal landscape would be fundamentally different. The definition of rape in the Elements of Crimes of the International Criminal Court, which for so long escaped consensus amongst parties to the Rome Statute, relied in large part on the *Furundzija* Trial Chamber's definition, itself based on domestic law. Just as in the Czech and Slovak legal systems, reference to external material has assisted tribunals develop the law when sources within the legal system are inadequate or absent.

iii. Domestic Law as an Auxiliary Argument

The third hypothesis outlined in the first chapter suggested that reference to extra-systemic law is only a subsidiary argument. As John Bell noted, 'the argument from a foreign legal system typically adds lustre to an argument already available in the host legal system, it is a further thread to support an argument which already has support within the national sources of law.'[10] The case law of the three jurisdictions examined in Part Two of this thesis suggests that domestic law does not necessarily play an auxiliary role when invoked by international courts and tribunals. In fact, all three jurisdictions examined have used domestic law as a primary argument.

Take the practice of the WTO examined in Chapter Six as an example. In *EC-Chicken Cuts,* domestic law was identified by the AB as a 'circumstance of conclusion' of the WTO Agreement of which parties could reasonably be expected to have knowledge. Domestic law was not used as an auxiliary argument in this case, but was instead the main argument upon which the interpretation of the AB rested. Similarly, the Appeal Chamber in *Erdemovic* and Trial Chamber in *Blaskic* used of domestic law as the main argument for interpreting the guilty plea and the power

[9] *Prosecutor v Aleksovski* (Appeals Chamber Judgement) IT-95-14/1-A (24 March 2000), para 107-11.
[10] J. Bell, 'The Argumentative Status of Foreign Legal Arguments' (2012) 8 Utrecht LR 8, 11. See also Bobek, *Comparative Reasoning*, 216-17.

to issue binding orders/*subpoenas* as they did. However, this is not to say that domestic law is always used as a stand-alone argument by international courts and tribunals. To the contrary, it is frequently combined with other arguments, especially in the context of the ECtHR. For example, in *Demir and Baykara v Turkey*, the ECtHR used consensus analysis alongside the lack of identification of a 'pressing social need' and the existence of international conventional obligations to reject the respondent state's argument that interference was justified. Similarly, the use of domestic law by the *Furundzija* Trial Chamber was not in itself sufficient to determine whether forced oral sex constituted rape.

How might we explain this difference between the use of extra-systemic arguments by domestic courts and international courts? Three explanations seem possible. First, it is clear that some international law regimes suffer from a greater lack of intra-systemic sources than domestic systems, and hence have required to draw on sources from outside the regime more frequently. This certainly seems to be true for the ICTY in the nascent stages of development of international criminal law. Second, as demonstrated by the case law of the WTO, in certain circumstances the provisions of the Vienna Convention provide a clear justification for reference to extra-systemic law that is not generally present in domestic legal systems.[11] If a domestic law constitutes a circumstance of conclusion of a treaty, subsequent practice, or manifests a special meaning, the court need not relegate an argument based on domestic law to a subsidiary position. Third, unlike most domestic law systems, international law regimes have often been created from a blank slate with elements of domestic law and procedure incorporated as the drafters or delegates saw fit. Again, the adoption of the guilty plea and *subpoena*/binding order powers in the context of the ICTY provides an illustrative example. In these instances, the wholesale

[11] Although cf. South African Constitution, art 39(1)(c), which provides that 'When interpreting the Bill of Rights, a court, tribunal or forum... (c) may consider foreign law.'

transposition of legal institutions creates a stronger argument for reference to the 'donor' legal system than might exist in domestic law.[12]

Finally, a point of interest should be noted which could provide another explanation for the different treatment of foreign law in domestic courts, on the one hand, and domestic law in international courts, on the other. Some judges – whether by virtue of their training, nationality, or personal outlook – are more likely to invoke domestic law than others. In the context of the ICTY, one cannot help but notice that the same names crop up frequently when domestic law is invoked – Gabrielle Kirk McDonald, Lal Chand Vohrah, and Florence Ndepele Mwachande Mumba.[13] A causal link between these judges and the use of domestic law certainly has not been made out, nor was it the aim of this thesis to examine such a link. However this reminds us that there is an inescapably personal element to interpretation. The legal training one receives (perhaps it is no coincidence that the three abovementioned judges were trained in common law systems), the background presuppositions one holds, and the experiences one has had often indelibly influence the approach to interpretation taken.[14]

To conclude, domestic law is used in the interpretation of international law, even if the domestic law does not evidence a rule of custom or a general principle of law. The case studies examined in Part Two of this thesis demonstrate that a diverse selection of international courts and tribunals have used domestic law *inter alia* to remedy deficiencies in intra-systemic sources, to interpret legal institutions imported from domestic systems, or to interpret standards of conduct. From the use of domestic law within the rubric of Articles 31 and 32 by the panels and AB of

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[12] Cf. Chapter One, text accompanying fns 123-25.

[13] Gabrielle Kirk McDonald sat on the *Blaskic* Trial Chamber Decision on *Subpoena* and the *Erdemovic* Appeals Chamber; Lal Chand Vohrah sat on the *Furundzija* Appeals Chamber and the *Erdemovic* Appeals Chamber; Florence Ndepele Mwachande Mumba sat on the *Furundzija* Trial Chamber, and the *Kunarac* Trial Chamber.

[14] Cf. Chapter One, text accompanying fns 146-50 (discussing the different propensities of English and French judges to cite extra-systemic sources).

the WTO to the interpretation of 'inhuman and degrading treatment' by the ECtHR, domestic law has played – and continues to play – an important role in the interpretive practice of international courts and tribunals.

II. Domestic Law as Legitimate Interpretation

Understanding how, when, and if domestic law should be used to interpret international law has been the focus of this thesis. The analysis of the case studies above responds to the first question posed at the outset of this thesis; namely, is domestic law used to interpret international law? In order to respond to the second question – is the use of domestic law permissible? – a re-assessment of how we evaluate interpretation was required. To move beyond the VCLT, Chapter Three elaborated a theory of legitimate interpretation. This section briefly recaps the arguments in favour of this theory, as well as outlining some of its limitations.

i. The Utility of Legitimate Interpretation

The main claim made in Part One of this thesis was that we cannot simply refer to Articles 31 and 32 of the Vienna Convention in order to discover if recourse to domestic law is permissible. The strongest argument against using the VCLT as an evaluative framework is that myriad interpretive methodologies are accommodated by its provisions, leaving it to the good judgment of the interpreter to select the appropriate approach in light of the prevailing circumstances. As a result of this flexibility, the context-dependent nature of a permissible interpretation in any particular circumstances cannot be accounted for by the provisions of the VCLT. For example, the teleological interpretation favoured by the ECtHR and the strict textualism adopted by the AB of the WTO both find support in Article 31(1) of the Vienna Convention. Yet it would be wrong to say that a strict textual approach would be accepted in human rights law or a radical teleological approach in trade law simply because it drew authority from the VCLT. It was an

attempt to capture what made particular interpretive methodologies acceptable in certain circumstances that prompted the development of a theory of legitimate interpretation in Chapter Three.

In addition to providing an evaluative framework within which the context-specificity of interpretation could be accounted for, the theory of legitimate interpretation had several other benefits. First, it enabled us to understand which interpretations are more likely to affect behaviour. This claim was elaborated in the first half of Chapter Three, which drew on recent criminological work as empirical support for Thomas Franck's assertion that legal rules that are perceived to be legitimate foster voluntary compliance.

Second, the theory of legitimate interpretation is agnostic regarding whether the value or values underpinning the functioning of the court or tribunal are appropriate. It is in this sense an empirical conception of legitimacy – it states when interpretations are likely to be accepted by subjects of the legal system because of their perceived legitimacy, not whether these are the appropriate or correct values to foster within each regime. The ability to see the values that underpin the acceptance of interpretive methodologies allows us to launch a more profound and critical approach of interpretation than one undertaken from behind the veil of formal interpretive methodology. Once we acknowledge that it is not the VCLT but rather a certain view of the correct functioning of legal regime that dictates accepted interpretations, we can question if those values are appropriate in the particular context and whether the interpretive method pursued by the court or tribunal gives effect to those values. The textualist approach favoured by the WTO AB, for example, is based on the security and predictability of international trade. However, should that value give way to other considerations, such as environmental protection, and how might interpretation permit this reconciliation? By adopting the theory of legitimate interpretation, we are able to address these questions.

The conception of legitimate interpretation developed in Chapter Three is comprised of three factors: interpretive authority (normally demonstrated by consent to adjudication by the court or tribunal), procedural justice, and shared values. In each of the three case studies, it was the final element of legitimate interpretation that proved pivotal for our evaluation. The use of domestic law was legitimate in each instance because the court or tribunal deployed it in pursuance of the values recognised by those within the legal system to underpin the functioning of the judicial institution. Whilst the courts and tribunals examined in Part Two of this thesis deployed domestic law squarely in pursuance of a value underpinning their functioning, it could well be the case that other tribunals have adduced domestic law in a fashion that is incongruent with any of the values underpinning the tribunal. The only conclusion that could be drawn in that scenario is that the use of domestic law would be judged illegitimate and hence not accepted by subjects of the legal system.

One potential critique should be addressed: that of cherry picking values. It could be argued that the values identified in Chapters Four to Six were subjectively imputed to the regimes, and that many more values underpin the functioning of each of the jurisdictions examined. This is undoubtedly true. However, the theory of legitimate interpretation does not rely on examining interpretations against an exhaustive list of values. Rather, it aims to demonstrate why an interpretation is likely or not to be accepted by its addressees and other subjects of the legal system. It was hence by examining the selected values that we can best understand why the use of domestic law was accepted in that context. And it is in uncovering those values that we lay the groundwork for later enquiries as to whether they are appropriate considerations to animate the functioning of the regime. To reiterate, the label 'legitimate' in this context bears no kind of tacit approval; it is used purely as a descriptive theory that lays bare the fundamental values that underlie interpretation.

ii. The Limits of Legitimate Interpretation

Viewing interpretation through the lens of legitimate interpretation is not, however, a panacea. It is both a strength and a limitation of the theory of legitimate interpretation that it is agnostic regarding the values underpinning a particular regime. Further enquiries into the interpretive practice of a tribunal might use legitimate interpretation to first shed light on the values underpinning the practice of the tribunal, then move to critically assess whether it is appropriate for the tribunal's interpretive methods to be dictated by such values. To undertake this kind of enquiry was not the task of this thesis. Instead, it simply laid the groundwork for a different approach to evaluating and understanding interpretation.

A further point bears mention. Legitimacy must be seen in this context as a matter of degree. For example, interpretations of the ECtHR that rely on consensus analysis are only legitimate insofar as they survey a sufficiently large and representative group of Council of Europe states to discern what the accepted standard of conduct is.[15] By conceiving of legitimacy as a spectrum, we are able to account for a whole range of different interpretive approaches, from those that are totally at odds with the values of the regime, through to those that are consonant with the values but methodologically flawed.

iii. Practical Implications

In the Introduction, the practical implications for the findings of this thesis were highlighted. What lessons can we draw from the above analysis of the use of domestic law? Two findings are of particular note. First, domestic law is used to interpret international rules even if that domestic law does not constitute a general principle or evidence a rule of custom. Perhaps more than any other point, this point is worth emphasising – when faced with imported legal institutions, an

[15] See Chapter Five, text accompanying fns 65-66.

absence of intra-systemic sources, or international rules with clear parallels in domestic law, tribunals have not felt it necessary to constrain themselves within the rubric of Articles 31 and 32. Once this is recognised, the methodological difficulties associated with the induction of a general principle from domestic law might – depending on the circumstances – be avoided. To sum up, arguments based on comparative law do not need to be framed in terms of Article 31(3)(c) VCLT to be successful.

Second, this thesis demonstrated that the context in which the interpretation occurs is of utmost importance. Both the character of the law being interpreted and the legal regime in which the interpretation takes place is pivotal to the acceptability of comparative arguments. Rules imported from domestic systems, those that have direct analogues in domestic law, and those that enshrine standards of conduct are liable to be interpreted in reference to domestic law. Similarly, regimes that cannot draw on intra-systemic sources (for example, analogous rules or precedents) are more likely to have recourse to external sources in the interpretation of rules. To conceive of interpretation as an activity regulated by a 'general rule' is misguided; the process is highly context-specific and a large part of this thesis has been dedicated to emphasising this point. Articles 31 and 32 are no longer sufficient to understand or explain the diversity of interpretation, if they ever have been.

Let us take turn to one of the examples outlined in the Introduction to illustrate the practical application of the findings of this thesis. Recall that Stephan Schill contented that comparative public law should be used to interpret provisions of bilateral investment treaties (BITs), such as the obligation to accord fair and equitable treatment (FET) to investors. He argued that investment law and public law serve similar functions, namely, to act as a constraint on the exercise of sovereign power. As a result, general principles of public law could be used to inform the interpretation of investment agreements, by virtue of Article 31(3)(c) of the Vienna

Convention, allowing investment tribunals to access the wealth of experience that domestic systems embody.[16]

The findings of this thesis suggest that Schill's argument that comparative law should be used to interpret BITs would not have to be made on the basis of general principles. Instead, one could argue that certain provisions of BITs enshrine standards of conduct for states and hence should be interpreted in reference to domestic law. In relation to the FET obligation, the general structure of the argument would be as follows: the FET provision enshrines a standard of conduct that is incumbent on host states; absent adequate intra-systemic precedent (for example, cases dealing with expropriation of the same kind of property),[17] the arbitral tribunal could either impose its own conception of what is 'fair' or 'equitable' or otherwise draw on the treatment of analogous situations in domestic law to understand what is considered to be fair and equitable globally. The former would constitute unwarranted judicial activism and hence domestic law should be used to interpret the FET obligation.

This thesis demonstrated that domestic law is used in the interpretation of international law. Whilst this phenomenon has been explored in a limited number of sub-fields, the literature lacked a multi-jurisdictional analysis that theorises why domestic laws are used to interpret international law and why their use is accepted in certain situations. In the course of this enquiry, more fundamental questions were addressed regarding the centrality of the VCLT provisions to interpretation and the appropriate framework within which to evaluate interpretation. In the 1918 case of *Towne v Eisner*, Oliver Wendall Holmes loquaciously stated that 'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color

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[16] Introduction, text accompanying fn 18.

[17] Of course, this argument takes as a premise that international investment law constitutes a legal regime; on this point, see S.W. Schill, 'International Investment Law and Comparative Public Law – An Introduction', in S.W. Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 17-23.

and content according to the circumstances and the time in which it is used.'[18] In international law, just as in domestic law, it is only when we acknowledge this mutability that we are able to start to understand the complexity and contextuality that interpretation inevitably entails.

[18] *Towne v Eisner*, 245 U.S. 418 (1918) (Holmes J., for the Court).

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